JUL 11 2001

Supreme Court, U.S.
FILED
JUL 11 2001
CLERK

No. 00-1187

In The

Supreme Court of the United States

DAVID R. McKUNE, Warden; CHARLES SIMMONS, Secretary, Kansas Department of Corrections,

Petitioners,

v.

ROBERT G. LILE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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3:95cv3266 Lile v. McKune, et al

MTNDDL

6/28/95	1	MOTION by Plaintiff to proceed in forma pauperis (cam)
6/28/95	2	COMPLAINT (cam)
		* * *
3/1/96	77	MOTION by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels (cam) [Entry date 03/04/96]
3/1/96	78	MEMORANDUM in support re: motion by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels [77-1] (cam) [Entry date 03/04/96]
3/1/96	79	FIRST AMENDED COMPLAINT [2-1] by plaintiff terminating defendant Allen Ohlstein, defendant Jane Doe, defendant John Doe, defendant Barbara Owens, defendant William Cummings, defendant Raymond (nmi) Roberts, defendant John Callison, defendant Rudy Stupar (cam) [Entry date 03/04/96]
		* * *
3/18/96	83	RESPONSE by defendant David R McKune, defendant Charles Simmons to motion by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels [77-1] (cam) [Edit date 03/18/96]

3/18/96	85	ANSWER - by defendant David R McKune & defendant Charles Simmons to 1st amended complaint [79-1] (cam) [Edit date 03/28/96]
3/18/96	84	MEMORANDUM in response by defendants McKune & Simmons to pltf's motion for temporary injunction re: [83-1] (cam) [Entry date 03/27/96]

* * *

3/27/96	92	REPLY by plaintiff to response to motion by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels [77-1] (cam) [Entry date 3/29/96]
3/29/96	93	MINUTE SHEET of Hearing on Motion for Preliminary Injunction at Topeka, KS, before Hon. DES: (Lyon, CSR) Taking under advisement on 3/30/96 the motion by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels [77-1] (cam)
4/23/96	94	ORDER ENTERED: by Senior Judge Dale E. Saffels granting motion by plaintiff for temporary injunction [77-1]. Pltf to continue on waiting list for SATP programming at Lansing Correctional Facility, & defts enjoined from coercing in any manner pltf's acceptance of or participation in SATP programming, until merits of pltf's claims have been decided (cc: all counsel) (cam)

* * *

1/10/97	130	MOTION by defts Charles Simmons and David R. McKune for summary judgment, or, in the alternative, judgment on the pleadings; referred to Senior Judge Dale E. Saffels (ms) [Entry date 01/13/97
1/10/97	131	MEMORANDUM in support of motion by defts Charles Simmons and David R. McKune for summary judgment, or, in alternative, judgment on the pleadings; referred to Senior Judge Dale E. Saffels [130-1-(ms) [Entry date 01/13/97]
1/10/97	132	EXHIBITS filed by defendants re: [130-1] motion by defts Charles Simmons and David R. McKune for summary judgment, or, in the alternative, judgment on the pleadings; referred to Senior Judge Dale E. Saffels (ms) [Entry date 01/13/97]
1/10/97	133	MOTION by pltf Robert G. Lile for summary judgment; referred to Senior Judge Dale E. Saffels (ms) [Entry date 01/14/97]
1/10/97	134	MEMORANDUM by plaintiff Robert G. Lile in support of motion by pltf Robert G. Lile for summary judgment; to Senior Judge Dale E. Saffels [133-1] (ms) [Entry date 01/14/97]

* * *

1/28/97	139	MOTION by pltf for summary judgment; referred to Senior Judge Dale E. Saffels (ms) [Entry date 01/30/97]
1/28/97	140	MEMORANDUM by plaintiff Robert G Lile in support of motion by pltf for summary judgment; referred to Senior Judge Dale E. Saffels [139-1] (ms) [Entry date 01/30/97]

1/29/97 137 PRE-TRIAL ORDER ENTERED by Senior Judge Dale E. Saffels: Terminating case referral of Magistrate Judge Ronald Newman: Discovery is complete. Pending motions are defts' motion for summary judgment (Doc. 130) pltf's motion for summary judgment (Doc. 133) & Pltf's motion to extend (Doc. 135). Court trial in Topeka, KS. Ready for trial after 1/10/97 and disposition of any pending motions. ETT: 2 days. Prospects for settlement are poor. (cc: all counsel) (mb)

* * *

2/3/97 141 RESPONSE by plaintiff re: [131-1], defts' memorandum in support of summary judgment (ms) [Entry date 02/05/97]

2/3/97 142 RESPONSE by defendants to motion by pltf for summary judgment, [139-1] and [133-1]; referred to Senior Judge Dale E. Saffels (ms) [Entry date 02/05/97]

2/19/97 143 REPLY by defendants to plaintiff's response to defts' memorandum in support of motion for summary judgment; referred to Senior Judge Dale E. Saffels [130-1] (do) [Entry date 02/20/97]

2/20/97 145 REPLY by plaintiff to defts' response to motion by pltf for summary judgment; referred to Senior Judge Dale E. Saffels [133-1] [139-1] (ms) [Entry date 02/25/97]

2/21/97 144 RESPONSE by defendant re: [140-1] pltf's memorandum in support of summary judgment concerning fourth and fourteenth amendment rights and polygraph and plethysmograph examinations (ms) [Entry date 02/24/97]

3/12/97 146 REPLY by plaintiff to defts' response to motion by pltf for summary judgment; referred to Senior Judge Dale E. Saffels [139-1] (ms) [Entry date 03/14/97]

* * *

1/8/98 151 MINUTE SHEET of motions hearing held at Topeka before Judge Saffels: – Counsel argues summary judgment motions (doc #130, 133, 139) and they are taken under advisement by the court. Order will be issued. Court Reporter: Lyon (do) [Entry date 01/09/98]

* * *

9/16/98 153 MEMORANDUM AND ORDER by Senior Judge Dale E. Saffels: Summary judgment is granted to plaintiff on his Fifth Amendment claim; summary judgment is granted to defendants on plaintiff's privacy claim. The temporary injunction granted to plaintiff in this matter is continued until the judicial disposition of plaintiff's claims are finalized through appellate review or until the time for seeking such appellate review has expired. [139-1] [133-1] [130-1] 25 pages (cc: all counsel) (do)

9/16/98 154 JUDGMENT ON DECISION BY THE COURT ENTERED BY THE CLERK: re [153-1]: Summary judgment is granted to plaintiff on Fifth Amendment Claim; summary judgment is granted to defts on pltf's privacy claim. Temporary injunction granted to pltf in this matter is continued until the judicial disposition of pltf's claims are finalized through appellate review or until the time for seeking such appellate review has expired; dismissing case (cc: all counsel) (do)

* * *

10/13/98 156 NOTICE OF APPEAL by defendants David R. McKune, and Charles Simmons from Dist. Court Decision filed 9/16/98 re: [154-2], re: [153-1] (cc: all counsel, 10CCA) (do) [Entry date 10/14/98]

Case Nos. 98-3292 and 98-3294

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT G. LILE,
Plaintiff/Appellee/Cross-Appellant,

vs.

DAVID R. McKUNE, Warden and **CHARLES SIMMONS,** Secretary of Corrections, Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Kansas

APPENDIX
Vol. 1

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Copies of Memorandum regarding Summary Judgment do not contain the supporting exhibits.

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KDOC Internal Management Policy and Procedure 11-101	1/10/97 as exhibit 8 to Defendants' Memorandum for Summary Judgment	0021
Plaintiff's Memorandum for Summary Judgment	1/10/97	0041
Pretrial Order	1/29/97	0079
Plaintiff's Response to Defendant's Motion for Summary Judgment	2/3/97	0094
Defendants' Response to Plaintiff's Motion for Summary Judgment	2/3/97	0125
Defendants' Reply to Plaintiff's Response to Summary Judgment	2/19/97	0139
Plaintiff's Reply to Defendants' Response to Summary Judgment	2/20/97	0145

Defendants' Response to Plaintiff's Memorandum re 4th and 14th Amendments	2/21/97	0166
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Order Clarifying the Finality of the Court's Order of 9/16/98	12/29/98	0253

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 98-3292 and 98-3294

ROBERT G. LILE,

Plaintiff/Cross-Appellant/Appellee

vs.

DAVID R. McKUNE, Warden and CHARLES SIMMONS, Secretary of Corrections,

Defendants/Appellants/Cross-Appellees

On Appeal from the United States District Court
for the District of Kansas
Case No. 95-3266-DES
The Honorable Dale E. Saffels

SUPPLEMENTAL APPENDIX FOR PLAINTIFF/ CROSS-APPELLANT/APPELLEE

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SUPPLEMENTAL APPENDIX FOR PLAINTIFF/ CROSS-APPELLANT'S BRIEF

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[1] Defendants did not include one of Plaintiffs' Memorandum in Support of His Motion for Summary Judgment (the memorandum regarding Mr. Lile's privacy claim). As with Defendants, Mr. Lile has not included supporting exhibits to this memorandum. However, Mr. Lile has included the underlying exhibits supporting his Statement of Facts in this Appendix.

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Kansas Department of Corrections

[LOGO] INTERNAL MANAGEMENT POLICY AND PROCEDURE

SECTION NUMBER 11-101

PAGE NUMBER 1 of 8

SUBJECT:
DECISION MAKING: Offender Privileges and Incentives

POLICY

The Kansas Department of Corrections shall implement a comprehensive system of earnable offender privileges which will provide an effective means of managing the offender population and reinforcing constructive behavioral changes in offenders.

DEFINITIONS

Post Incarceration Supervision: The supervision of offenders for any type of release from a KDOC facility, to include release to parole, conditional release, and post release supervision.

Condition violator (CV) unit: Specialized facility or unit that houses inmates who have violated conditions of post incarceration supervision but have not been convicted of a new offense.

Self-help program or activity: Those programs and activities listed in Attachment A.

Exempt Canteen/Property Items: Television, typewriter, radio/cassette-recorder, fans and tennis shoes.

PROCEDURES

I. Earnable Privileges

A. The following earnable privileges are included in the Offender Privileges and incentive Level System:

1. TV Ownership;
2. Handicrafts;
3. Participation in organizations and formalized activities, except as indicated below;
   a. The offender's incentive level status shall not be used as a factor in consideration of placement into a formalized education or treatment program or service or participation in a self-help program or activity.
4. Use of outside funds;
5. Canteen expenditures;
6. Property;
7. Incentive Pay; and
8. Visitation.

II. Incentive Levels

A. Earnable privileges shall be grouped into four (4) levels for incarcerated offenders. These levels are:

1. Intake Level;
2. Level I;

3. Level II; and
4. Level III.

B. Earnable privileges shall be grouped into two (2) levels for offenders on post incarceration supervision. These levels are:

1. Level IV; and
2. Level V.

C. Except as provided below, earnable privileges for intake Level through Level III shall be administered in accordance with Attachment A.

1. Inmates participating in a KDOC work release program for reintegration at Wichita Work Release Facility (WWRF) or Hutchinson Correctional Facility (HCF) Work Release Unit shall be eligible to earn privileges in accordance with applicable general orders.
2. Inmates participating in the mental health programs at LCMHF and the maximum female unit at TCF shall be eligible to earn privileges in accordance with applicable general orders.
3. Inmates released from Larned State Security Hospital (LSSH) or Chemical Dependency Rehabilitation Program (CDRP) after receiving mental health or substance abuse treatment shall have their incentive levels determined by the unit team upon their return to a KDOC facility.
   a. When computing the proper incentive level, the unit team shall give the inmate credit for time served if the

inmate has completed the treatment program.

4. Parolees participating in a KDOC pre-revocation program shall be eligible to earn privileges in accordance with applicable general orders.

D. Earnable privileges for Levels IV and V shall be administered in accordance with relevant Chapter 14, Parole Services IMPPs.

III. Progression Through Levels

A. Intake Level

1. Upon admission to the Department at an intake facility, offenders shall be assigned to the Intake Level.

a. While at the Intake Level, inmates are limited to up to $5.00 per pay period in canteen expenditures for those items identified in section V.B.1.a. of this IMPP and shower shoes.

2. Except as provided in section III.A.2.c. below, completion of the assessment and evaluation process at the intake facility and transfer to a facility for housing shall be considered successful completion of the Intake Level.

a. Offenders transferred to a facility for housing after refusing to complete the assessment and evaluation process shall remain at the Intake Level until completion of the assessment and evaluation process.

b. Offenders convicted of a class I or class II disciplinary offenses while at

the intake facility must remain disciplinary conviction free through the first regularly scheduled 120 day review following admission in order to be promoted to Level I.

c. Offenders returned to prison as violators of supervised release with no new sentence shall remain at the Intake Level until such time as orientation is completed at one of the condition violator (CV) units.

B. Level I

1. Inmates successfully completing the assessment and evaluation process at intake facility shall be promoted to Level I upon placement at another facility.

2. To complete Level I, an inmate must remain free of class I and class II disciplinary reports and demonstrate a willingness to participate in recommended programs and/or work assignments for a full review cycle (minimum of 120 days).

a. Inmates returned to Level I for a second time (i.e., the inmates' third time on Level I) or a subsequent time must remain free of class I and class II disciplinary reports and demonstrate a willingness to participate in recommended programs and/or work assignments for two (2) full review cycles in order to promote to Level II.

C. Level II

1. Upon successful completion of Level I, the inmate shall be promoted on Level II.

2. Requirements for successful completion of Level II are the same as for Level I, as outlined in section III.B.2. of this IMPP.

D. Level III

1. Upon successful completion of Level II, the inmate shall be promoted to Level III.

2. An inmate shall remain on Level III provided he/she does not demonstrate inappropriate behavior as outlined in section IV of this IMPP.

E. Level IV

1. Upon release to post incarceration supervision, the offender shall be promoted to Level IV.

2. To complete Level IV, an offender shall:

a. Have no positive urinalysis for six (6) months;

b. Have actively participated in or completed required/recommended programs;

c. Not have incurred arrest or convictions (excluding minor misdemeanor convictions which are traffic/parking related); and

d. Have made scheduled payments toward restitution and court costs as instructed by the parole officer, and shall have paid supervision fees on schedule.

F. Level V

1. Upon successful completion of Level IV, the offender shall be promoted to Level V.

2. An offender shall remain on Level V provided he/she does not violate any terms or conditions outlined in section III.E.2. of this IMPP.

G. The offender shall not advance to another incentive level if the offender has a pending disciplinary action. The decision as to whether the offender moves forward or backwards, or remains stationary, on offender privileges and incentives level system shall be based upon the disposition of the disciplinary action.

1. An appeal shall not preclude movement.

IV. Reductions in Level

A. An inmate shall be reduced one (1) incentive level for any of the following:

1. Two (2) or more disciplinary reports during a single 120 day period which result in a conviction for either a class I or class II offense;

2. Any disciplinary conviction, not listed in section IV.B.4., which results in a loss of custody.

B. An inmate shall be automatically reduced to Level I for any of the following:

1. Termination from a work or program assignment for cause;

2. Refusal to participate in recommended programs at the time of placement;

3. Offenses committed in which a felony charge is filed with the district or county prosecutor;

4. Disciplinary convictions for:

a. Theft (KAR 44-12-203);

b. Being in a condition of drunkenness, intoxication, or a state of altered consciousness (KAR 44-12-311);

c. Use of stimulants, sedatives, unauthorized drugs, or narcotics, or the misuse, or hoarding of authorized or prescribed medication (KAR 44-12-312);

d. Sodomy, aggravated sodomy, or aggravated sexual act (KAR 44-12-314);

e. Riot or incitement to riot (KAR 44-12-319);

f. Arson (KAR 44-12-322);

g. Assault (KAR 44-12-323);

h. Battery (KAR 44-12-324);

i. Inmate Activity (limitations) (section c of KAR 44-12-325);

j. Sexual Activity (KAR 44-12-326);

k. Interference with Restraints (KAR 44-12-327);

l. Relationships with Staff (KAR 44-12-328);

m. Work Performance (section a of KAR 44-12-401a); or

n. Dangerous Contraband (KAR 44-12-901).

C. Inmates may be placed on restriction by the disciplinary board without a level reduction. Upon serving the restriction, the offender's

privileges shall be restored commensurate with his/her incentive level.

D. Except as provided below, offenders on post release supervision shall be reduced from Level V to Level IV for violation of terms and conditions outlined in section III.E.2. of this IMPP.

1. Offenders returned to prison as condition violators with no new sentence shall return to intake Level as provided in section III.A.2.c. of this IMPP.

E. Except as indicated below, property items not authorized at the incentive level to which the inmate is reduced shall be removed from the facility in accordance with the provisions of IMPP 12-120.

1. Exempt canteen/property items, per IMPP 12-120, which includes but are not limited to sound equipment and large appliances, authorized at incentive Level II and III shall be stored upon the offenders first return to Level I. Such items shall be removed from the facility in accordance with the provisions of IMPP 12-120 at the inmate's expense in the following situations:

a. The inmate is returned to Level I for a second or subsequent time; or,

b. The inmate is returned to Level I and fails to advance to Level II at the earliest possible review or opportunity.

2. Offenders reduced from Level III to Level II may retain in-cell handicraft materials and supplies purchased while on Level III.

F. Upon an offenders return to Level I, property items allowed under the provisions of IMPP 12-120 Section X.B. shall be removed from the facility in accordance with established policy.

G. If an inmate's incentive level is reduced during a payroll period, canteen expenses for the entire period shall not exceed that which is authorized by the incentive level to which the inmate shall be reduced.

1. If at the time the inmate is reduced to a lower incentive level the inmate has already spent or exceeded the maximum amount allowed under the reduced incentive level, the inmate shall not be permitted to spend any additional funds.

H. An inmate eligible to earn incentive pay who refuses to participate in a job assignment shall be precluded from access to the canteen, except for purchase of approved items.

V. Inmates Confined in Administrative, or Disciplinary Segregation or Assigned Restriction

A. Administrative Segregation

1. In accordance with the provisions of KAR 44-14-306, inmates confined in administrative segregation shall be eligible, as much as possible, to earn and maintain privileges in the same amount and manner as any other inmate in the general population.

B. Disciplinary Segregation

1. Inmates confined in disciplinary segregation shall not have access to privileges, except as described below:

a. Canteen expenditures, as authorized by the facility warden but, if authorized by the facility warden, not to exceed $10.00 per payroll period for the purchase of the following items only.

1) Shampoo and approved hair care products listed as allowable property in IMPP 12-120;

2) Denture adhesive creme or powder;

3) Creme or stick deodorant;

4) The following writing supplies:

a) Stamps (not to exceed 10);

b) Writing paper (not to exceed 1 pad);

c) Envelopes (not to exceed 10); and

5) Feminine hygiene products listed as allowable property in IMPP 12-120 (females only).

b. Upon release from disciplinary segregation, the inmate shall return to one (1) incentive level below that which he or she was at prior to placement into disciplinary segregation.

c. Inmate assigned to restriction shall be limited to privileges in accordance with applicable regulations.

1) Canteen expenditures shall be limited to the dollar amount and

items specified in section V. B. 1. a. of this IMPP.

VI. Transition

A. All offenders, with the exception of condition violators with no new sentences, transferred from the intake facility upon completion of assessment and evaluation prior to January 1, 1996, shall be granted Level III privileges.

1. Such offenders shall be subject to the provisions of this IMPP and may be reduced in incentive level in accordance with section IV.

2. Condition violators with no new sentences housed at a designated KDOC condition violator unit shall remain on the incentive level they were at prior to January 1, 1996.

B. All offenders held in disciplinary segregation on January 1, 1996, for convictions on rule violations occurring prior to January 1, 1996, shall be granted Level III privileges upon release.

1. Any offenders placed in disciplinary segregation after January 1, 1996, for conviction of a rule violation occurring prior to January 1, 1996, shall be granted Level III privileges upon release.

VII. Monitoring of Offender Incentive Level

A. The assigned unit team counselor or parole officer shall be responsible for ensuring that the incentive level entered into the computerized database reflects the offenders current status.

VIII. Program Monitoring

A. The Deputy Secretary of Facility Management and Deputy Secretary of Community and Field Services, or their designees, shall annually review the Offender Privileges and Incentive Level System's effectiveness in managing the offender population and reinforcing constructive behavioral changes in offenders.

B. A report of findings shall be provided to the Secretary of Corrections annually on August 1.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff and offenders and those entities who are contractually bound to adhere to them. They are not intended to establish State created liberty interests for employees or offenders, or an independent duty owed by the Department of Corrections to either employees, offenders, or third parties. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

Name/Type of Report	By Whom/To Whom	Due
Program Monitoring Report of Findings	Deputy Secretary of Facility Management and Deputy Secretary of Community and Field Services, or their designees/ Secretary of Corrections	August 1

REFERENCES

KAR 44-7-104, 44-12-203, 44-12-311, 44-12-312, 44-12-314, 44-12-319, 44-12-322, 44-12-323, 44-12-324, 44-12-325, 44-12-326, 44-12-327, 44-12-328, 44-12-401, 44-12-901, 44-12-1001 IMPP 04-108, 10-109, 10-113, 10-133, 12-120

ACO 2-3C-01

ACI 3-4214, 3-4215, 3-4263, 3-4280, 3-4407, 3-4442,

FCWC 11182

ATTACHMENTS

Offender Privileges and Incentives Level System, 1 page

Approved By:

/s/ Charles Simmons

Secretary of Corrections

Original Date Issued: 01-01-96

Current Amendment Effective: 01-01-96

Replaces Amendment Issued: N/A

OFFENDER PRIVILEGES AND INCENTIVES LEVEL SYSTEM
(For All Inmates Except Work Release Participants)

LEVEL	TV OWNERSHIP	HANDICRAFTS	ORGANIZATIONS/ FORMALIZED ACTIVITIES	LIMITATION ON OUTSIDE FUNDS	CANTEEN EXPENDITURES
INTAKE	No personal TVs.	Not available.	Severely Limited[1]	Limit to monies arriving with offender from county jail; outgoing funds limited to fees for legal services.	$5.00/payroll period for approved hygiene items.
LEVEL I	No personal TVs. Access to general TV viewing.	Not available.	Limited.[2]	Allow outside funds; expenditures restricted to canteen and restrict outgoing funds to $30 per pay period.[3]	$20.00/payroll period.
LEVEL II	May purchase personal TVs via canteen.	Not available.[5]	Limited.[2]	Allow outside funds; limit expenditures to canteen and restrict outgoing funds to $30 per pay period.[6]	$80.00/payroll period; may purchase exempt canteen items additionally.[7]
LEVEL III	May purchase personal TVs via canteen.	As allowed per IMPP 10-133.	Eligible to participate in all organizations / formalized activities.	Allow outside funds; limit expenditures to canteen and restrict outgoing funds to $30 per pay period.[8]	$140.00/payroll period; may purchase exempt canteen items additionally.[7]

(Footnotes On Following Page)

BEST AVAILABLE COPY

PROPERTY	*INCENTIVE PAY*	*VISITATION*
Intake property per IMPP 12-120.	Not available.	No visiting, except attorneys, clergy and law enforcement
Intake property per IMPP 12-120; tennis shoes, hot pot, and fan.	May earn up to current .60¢ per day incentive pay.	Attorneys, clergy, law enforcement, and immediate family only; follow KAR 44-7-104 and IMPP 10-113.[4]
Post-intake property per IMPP 12-120.	Eligible for any incentive pay level, including Industries; Level III inmates given higher priority.	Any approved visitor; follow KAR 44-7-104 and IMPP 10-113.
Post-intake property per IMPP 12-120.	As per IMPP 10-109.	Any approved visitor; follow KAR 44-7-104 and IMPP 10-113.

FOOTNOTES

[1] Self-help programs and activities shall be limited to the following for inmates on intake level: Library services, pastoral care/religious services, and gym and yard access.

[2] Self-help programs and activities shall be limited to the following for inmates on Level I and II: Alcoholic Anonymous (AA), Narcotics Anonymous (NA), library services, the Victim/Offender Reconciliation Program (VORP), pastoral care/religious services, gym and yard access, DADS/WALC, M_2W_2, and aftercare programming.

[3] The $30.00 limit on outgoing funds shall not apply to payments to the court for verified restitution and/or court costs, verified fees payable to attorneys for legal services, or verified child support payments and specialized fees/expenses as authorized by the warden or designee.

[4] Includes court/SRS appointed legal guardian.

[5] Offenders reduced from Level III to Level II may retain in-cell handicraft materials and supplies purchased while on Level III.

[6] Upon recommendation of the unit team and approval of the warden or designee, offenders assigned to private industry (minimum wage) or who receive government benefits may be authorized on an individual basis to send out funds in excess of the $30.00 per pay period limit (i.e., handcraft materials/supplies).

[7] Canteen expenditures shall be limited to $35.00 per week regardless of incentive I.

STAFF POLICIES ON CONFIDENTIALITY

I. Signature of each employee verifying that they have read the confidentiality procedure section of the manual.

II. To release information on a person under the age of 18, the parent, guardian, or authorized representative must sign the release of information form.

III. A written release of information must be obtained for any information release on a client. Request from other agencies must be accompanied by the completed valid release of information form.

IV. All case records must include a summary of the federal confidentiality guidelines (CFR 42, Part 2). Each chart must have written documentation which verifies that each client receives information about their rights of confidentiality.

_____

DEPOSITION EXHIBIT 12

S.A.T.P.
ADMISSION OF GUILT

This is to confirm that I understand the criteria for being accepted into the S.A.T.P. (Sexual Abuse Treatment Program) at Lansing Correctional Facility, which includes an admission of Guilt for my sex crime.

I realize that I am being allowed to participate in an evaluation for acceptance into S.A.T.P. with the understanding that I followed through with an Admission of Guilt.

This document will serve as my official Admission of Guilt to the following:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

_____ _____
Signature Date

_____ _____
Witness Date

_____

DEPOSITION EXHIBIT 4

SEXUAL ABUSE TREATMENT PROGRAM
ADMISSION OF RESPONSIBILITY

I understand a criteria for acceptance into the Sexual Abuse Treatment Program (SATP) at Lansing Correctional Facility includes an admission of responsibility for my sex offense.

I realize SATP is on my IPA/IPP and is a voluntary program.

This document will serve as my official Admission of Responsibility and my need for treatment.

I take responsibility for:_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____ _____

Signature Date

_____ _____

Witness Date

_____

SATP

DEPOSITION EXHIBIT 9
ra 10-25-96

SEXUAL ABUSE TREATMENT PROGRAM
ABBREVIATED SEXUAL HISTORY FORM

INSTRUCTIONS FOR COMPLETION OF PART I

OFFENDING BEHAVIOR

1) A "Part One" form must be completed for **EVERY** victim you list.

2) If you need additional space for each victim, add additional paper. We will supply you with paper.

3) Be sure and list every different act you did with this victim(s). Did you have intercourse, oral sex, digital penetration and/or any other combination, etc.

4) We know that you may not be able to list, with total accuracy, the specific amount of times you molested your victim(s), but what we want you to list is an **"honest estimate"** of how many times you molested your victim(s). You should think in terms of the **"maximum amount"** of times you molested each victim.

5) You should be very specific in listing exactly how you were able to get the victim to allow you to do what you wanted. If you groomed a victim, tell exactly how you groomed them. If you used force of any kind you must tell exactly what kind of force and how you did it. You must explain threats of force, etc.

6) It is very important to tell exactly how you were able to get the victim(s) to remain silent. Did you use threats, force, promises, gifts, trips, etc. This is crucial information that you should pay specific attention to and be explicit in detail.

THE IDENTIFICATION AND ACKNOWLEDGEMENT OF THIS INFORMATION IS VERY CRUCIAL TO YOUR TREATMENT PROCESS AND IN YOUR RECOVERY.

SATP

SEXUAL ABUSE TREATMENT PROGRAM
ABBREVIATED SEXUAL HISTORY

PART I
OFFENDING BEHAVIOR

Part I of your sexual history refers to the number of victims you have molested or otherwise offended against. You must think back to anyone or any situation that involved a *"lack of consent."* Remember, this section applies to those sexual activities where you were the perpetrator and a victim was involved. Each victim must be discussed separately. Answer these questions for the first victim and then start over on a new page for each additional victim. If you have any questions, refer back to the instruction sheet and/or ask for clarification. If you need more paper, let us know.

1) Name of Victim _____

   Age of Victim _____

   Your age at time of offense _____

2) How did you know this victim? _____
   (relative, neighbor, stranger, etc.)

3) What were the sexual acts you did with this victim? You should list all the things that you did or tried to do with this victim. Begin with the first incident and describe everything that happened. _____
   _____

   (If you need more space please use the back of this page or another sheet of paper)

4) How many times did you victimize this person? _____

5) Where did you do the victimizing? _____
   _____

6) How did you get the victim to do what you wanted? (Describe how you got the victim's cooperation. If you did not say anything, but you used some kind of force, bribe or trick, be sure to say what type it was.)
   _____
   _____

7) How did you get the victim to remain silent? (We need to know how you were able to keep the secret. Remember, sometimes victims don't tell because of things like your size, age and/or your position in the family.) _____
   _____

8) How did you get caught? _____
   _____

COMMENTS:

_____

DEPOSITION EXHIBIT 7

SATP

SEXUAL ABUSE TREATMENT PROGRAM
LIMITS OF CONFIDENTIALITY

The Sexual Abuse Treatment Program provides psychotherapy psychological evaluations and physiological evaluations for inmates in the Kansas Department of Corrections. The SATP staff wants you to feel comfortable in discussing your personal concerns with them, but you need to be aware of special situations in which confidentiality will be limited.

Overall safety is very important in treatment and prison. To ensure safety of everyone, the SATP staff must report situations which could be harmful to yourself or others, or a threat to the orderly operation of the facility, such as, but not limited to:

1) Mandatory reporting of child abuse.
2) Court ordered release of records.
3) Information needed to protect a third party.
4) Information needed to protect participants from harming themselves or others.
5) Escape planning.
6) inappropriate relations with staff.

The SATP staff provides reports to the Kansas Parole Board. Material from your SATP file may be reviewed by your SATP Treatment Team when preparing these reports.

When participating in the SATP, which is required by your program agreement/plan. The report to the Kansas Parole Board will include an assessment of your participation and progress during the group, psychological evaluations, physiological evaluations and recommendations for further treatment if indicated.

While the SATP staff encourages all group members to follow the instruction to keep anything said during group sessions to themselves, we can not guarantee that information discussed during group counseling will not be shared by group members with others. You need to be aware that confidentially violations can happen. Participants found to be sharing information from the group with others can be removed from the group.

I have read the information above and have been given the opportunity to ask questions about the limits of confidentiality.

Participants Signature:_____ Date:_____

Witness signature and title_____ Date:_____

DEPOSITION EXHIBIT 15

LCF-Central
LCF-East

SEXUAL ABUSE TREATMENT PROGRAM
TERMINATION PRIOR TO COMPLETION

I, _____, have freely chosen to terminate my commitment to the SATP/DCCCA, Inc. as of this date, _____.

I have been advised by _____, the LCF/SATP Facilitator, that it is in my best interest for me to participate in the Sexual Abuse Treatment Program. Although my failure to follow the advice I have received may effect my parole eligibility status, I nevertheless choose to terminate my commitment to this program. I assume the risks and consequences involved with this decision.

I CHOOSE TO TERMINATE FROM SATP/DCCCA, INC. FOR THE FOLLOWING REASONS:

_____

_____

_____

_____

I further understand that by signing this termination, my name will be removed from the waiting list. If I change my mind at a later date, the only way I will be considered for acceptance into SATP again is to submit a Form 9 to both Unit Team and SATP no earlier than 60 days from termination. My assignment to this program will then be on a space available basis only.

PARTICIPANT _____ KBOC # _____

WITNESS _____ DATE: _____

_____

IN THE UNITED STATES COURT
FOR THE DISTRICT OF KANSAS

ROBERT G. LILE, Plaintiff, vs. DAVID R. MCKUNE and CHARLES SIMMONS, Defendants.	)	Case No. 95-3266-DES

AFFIDAVIT OF ROBERT G. LILE

STATE OF KANSAS)
) SS.
COUNTY OF LEAVENWORTH)

I, Robert Lile, being first duly sworn, do hereby state as follows:

1. On January 6, 1983, I was convicted by a jury of aggravated kidnaping, rape, and aggravated sodomy in Johnson County District Court.

2. I pled innocent to these charges, and testified on my behalf, admitting that I had sexual intercourse with Diana Dahl, but maintaining that it was consensual; Diana Dahl testified that I forced her to have intercourse against her will.

3. I still steadfastly maintain that I did not rape or sodomize Diana Dahl, or have sexual intercourse with her against her will; Diana Dahl and I had consensual intercourse.

4. I appealed these convictions to the Kansas Supreme Court. On May 10, 1985, the Court affirmed the jury's verdict. *See State v. Lile*, 699 P.2d 456 (Kan. 1985).

5. I filed a state *habeas corpus* action in Johnson County District Court in 1988, Case No. 88-C-11319. This action was denied by the court.

6. I appealed the district court's denial of my state *habeas corpus* action to the Kansas Court of Appeals in 1989, Case No. 89-64134-A. The Kansas Court of Appeals affirmed the district court.

7. I appealed the court of appeals' ruling to the Kansas Supreme Court; the Court denied my prayer for review on September 20, 1990.

8. On February 14, 1991, I filed a *habeas corpus* action in federal district court challenging these convictions, Case No. 91-3057-DES (D. Kan. 1991). I voluntarily stayed this action shortly thereafter.

9. I filed a second state *habeas corpus* action in Johnson County District Court challenging these convictions, Case No. 92-C-4030. The district court denied this action.

10. I appealed the district court's denial of this *habeas* action to the Kansas Court of Appeals, Case No. 92-68708-AS. The Kansas Court of Appeals affirmed the district court's ruling.

11. I appealed the court of appeals' ruling to the Kansas Supreme Court; the Court denied my prayer for review on April 26, 1994.

12. On January 24, 1995, I filed a second *habeas corpus* action in federal district court challenging these

convictions, Case No. 95-3032-DES (D. Kan. 1995). This action is currently pending before the court.

13. I lived in maximum security at the Lansing Correctional Facility from 1983 until 1989; I currently live in the "M" Unit of the medium security prison at Lansing Correctional Facility, and I have lived there since 1989; when I filed this lawsuit in 1995, I had my own room in the "M" unit, but in 1996, I began sharing my room with another inmate.

14. In October, 1994, my Unit Team Counselor added the Sexual Offender Treatment Program to my Inmate Program Agreement ("I.P.A."); because the Sexual Offender Treatment Program required participants to sign an "Admission of Guilt" form regarding their sexual offense convictions, and because I had an appeal of my rape and sodomy convictions pending, I refused to sign my I.P.A. on October 11, 1994.

15. I filed a grievance with Warden David McKune on November 5, 1994, protesting the addition of the Sexual Offender Treatment Program to my I.P.A.

16. Warden McKune denied my grievance on November 29, 1994.

17. I appealed the denial of my grievance to Secretary of Corrections Charles Simmons.

18. Secretary of Corrections Charles Simmons denied the appeal of my grievance.

19. On March 23, 1995, Warden McKune issued an Interdepartmental Memorandum stating that inmates in

medium security who refuse to participate in recommended programs on their I.P.A. will be transferred to Cellhouse C-2 in maximum security.

20. Because of Warden McKune's Interdepartmental Memorandum stating that inmates would be transferred to maximum security if they did not participate in their recommended programs, I reluctantly signed my I.P.A. recommending my participation in the Sexual Offender Treatment Program on June 1, 1995. I agreed to the I.P.A. solely because I did not want to be transferred to maximum security.

21. Because the Sexual Offender Treatment Program required participants to sign an "Admission of Guilt" form, and because an appeal of my rape and sodomy convictions were pending, I filed a civil action, *pro se*, in federal district court on June 28, 1995 against Warden David McKune and Secretary of Corrections Charles Simmons on the grounds that forcing me to participate in the Sexual Offender Treatment Program violated my Fifth Amendment right against self-incrimination.

22. On August 9, 1995, Magistrate Ronald Newman appointed David Waxse of Shook, Hardy & Bacon as counsel to represent me in this lawsuit.

23. I felt coerced into signing the I.P.A. recommending the Sexual Offender Treatment Program because of my concern for being transferred to maximum security. In my experience, the difference between medium security and maximum security is striking:

a. In my experience, maximum security is a very hostile, intimidating environment because most of the inmates in maximum tend to have longer

sentences and are convicted of more serious crimes, and, as a consequence, care less how they act or treat others; for example, there are many inmates sentenced with "Hard 40's" in maximum, and I am unaware of any inmates in medium security with a "Hard 40" sentence;

b. In my experience, there is far more gang activity in maximum security, and very little gang activity in medium security; gang activity increases the violent and hostile atmosphere in maximum security;

c. In my experience, reported and unreported rapes and assaults of inmates are far more prevalent in maximum security than in medium security; one concern with maximum security is that there are more hidden places, such as the showers, for an inmates to rape or assault another inmate;

d. I have essentially free movement in medium security units; I have a key to the door of my room in medium security, and I can leave my room and walk throughout most of medium security anytime from 5:30 to 8:00 p.m; in maximum security, there is no freedom of movement throughout the maximum security section of the prison, and you cannot come and go as you please in maximum security; instead, in maximum security, you are only allowed out of your cell for scheduled programs, work, meals, the clinic, or if you are signed up to use the yard or library;

e. In medium security, because one generally has freedom of movement, one can use the phone at will, but in maximum security, because you are normally locked down in a cell, access to the telephone is strictly limited; in medium security, I

have a key to my room, whereas in maximum security, I would be locked down in a cell.

f. An inmate in medium security has more access to the yard than an inmate in maximum security; also, medium security has a gymnasium, and maximum security does not;

g. In my experience, because of the freer movement in medium security, it is far easier for an inmate to go to the clinic; in maximum security, in order to go to the clinic, an inmate needs a pass and must have an officer let him out of his cell;

h. In my experience, in medium security, I can generally shower whenever I want, but in maximum security, there is a strict schedule on when inmates may shower;

i. In my experience, sex offenders (pedophiles, rapists, child molesters, etc.) are seen as targets for rape and physical and mental assault in maximum security; sex offenders are perceived as deviants and freaks, and are subject to far more harassment and abuse than other offenders due to the nature of their offenses; in medium security, because the inmates want to maintain their medium security status, they are less prone to breaking prison rules or acting violently.

24. On January 1, 1996, Warden McKune instituted the Privileges and Incentives Level System for inmates at the Lansing Correctional Facility.

25. I am currently at Level III of the Privileges and Incentives Level; if I refuse to participate in the Sexual Offender Treatment Program, I will be dropped to Level I, the lowest Level of the program, and I will lose visitation

rights, property rights, canteen rights, and the opportunity for certain types of jobs that I currently enjoy.

26. If I take the Sexual Abuse Treatment program and I am required to sign the "Admission of Guilt" form and complete a Sexual Offense History, I will jeopardize the appeal of my rape and sodomy convictions and run the risk of incriminating myself regarding other sexual offenses; however, if I refuse to participate in the Sexual Abuse Treatment program, I will be transferred into maximum security, a far more hostile and restrictive environment, and I will lose a significant number of privileges I currently enjoy: it is a catch-22 situation that essentially leaves me no choice.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Robert G. Lile
ROBERT G. LILE

Subscribed and sworn before me, this 10 day of January, 1997.

/s/ [Illegible]
Notary Public

[seal]

My Commission Expires:

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE,	)	
Plaintiff,	)	
-vs-	)	Case No. 95-3266-DES
DAVID R. McKUNE, et al.,	)	
Defendants.	)	

THE DEPOSITION OF DAVID R. McKUNE, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Wednesday, November 6, 1996, at the Lansing Correctional Facility, in the City of Lansing, in the County of Leavenworth and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[5] justice from Wichita State University.

Q. Okay. Any other types of degrees or coursework?

A. No.

Q. No. How long have you been in prison administration?

A. Well, I started with the Department of Corrections in 1975, so –

Q. The Kansas Department of Corrections?

A. – depending on what you want to consider "administration" versus –

Q. And you've been warden at Lansing for five years now?

A. Just, yeah, right about five years.

Q. Prior to being warden, what was your position?

A. Prior to being warden here, I was the deputy secretary of corrections in Topeka, Kansas, for approximately two years.

Q. Two years. And prior to that, what was your position?

A. Prior to that, I was a deputy warden at Lansing. I think it was about two years.

Q. Okay. How long have you been familiar with the Lansing prison, then?

* * *

[9] requests?

A. Probably the most typical would be responding to the interrogatories, discovery requests, and that. Rarely, it goes to depositions. There's only been a couple times I've even been in court.

Q. Okay. Have you ever been in court in your role as a defendant for an inmate lawsuit?

A. The last one I appeared in was in the conditions of confinement lawsuit with Judge Rogers. That one I personally appeared in court. And I guess by saying – I mean, by "appearing in court," I mean me personally bodily being there. I mean, because usually I'm represented in the trial process.

Q. I want to ask you some questions about the incentive level program and the differences with that program and security classifications.

First of all, the incentive level program, that's something that is laid out in Internal Management Policy and Procedure 11-101, is that correct?

A. Correct.

Q. I'm going to show you what's been marked as [10] Deposition Exhibit 17 and I want you to flip through that and tell me if you're familiar with that and if that's something that's currently being used.

(Witness reviews material.)

A. Yes, I'm familiar and it's being used.

Q. (By Mr. Byrd) And that's the IMPP 11-101?

A. Correct.

Q. When did that come into effect?

A. The amendment was effective January 1 of '96.

Q. Okay. Is that the first time that the incentive level program kicked in?

A. Yes.

Q. So there was – that was the first time in the prison here at Lansing that you've had an incentive program?

A. It's the first time we have had any – an official program of incentives and privileges, yes.

Q. Okay. Were you involved with designing or setting up the incentive level program?

A. Yes.

Q. What was your involvement?

A. Well, what we have is we formed – basically, [11] this was developed and implemented as a KQM process.

Q. I'm sorry. Could you explain?

A. Kansas quality management. TQM, same thing, total quality management. Kansas – that's our adaptation is KQM. But basically it's a TQM process. And we had done this, basically, and we followed that process even before we implemented KQM, but that's where we came through. We had natural work groups, and that. We had – from the line level, we started and we issued questionnaires, focus groups, things like that, in following that process.

Then as the – well, the study group, as they addressed this issue, you know, they got all the input back and we formed a study group from each of the facilities, each of the regions, and to include the parole, because it does also address parole. Then those groups met, summarized the data, the input, the recommendations, the – just the comments of all the staff, all the

people they'd gathered, on how the best way to manage [12] privileges, how to best manage incentives and what most – the staff saw as the most effective way to do that.

Then that group met, summarized it, and basically developed a product that was very – that was similar to this. At that point, then we had what we call our system management team, which is the – the management group from the central office, the secretary, the deputy secretaries, chief counsel, MIS person, those people that make up his senior staff, management staff. Then in addition to that is the parole directors and the wardens. Then we met several times to go over that, to – to see what changes we wanted to make to it, what modifications, whatever, just to critique it. And at that point, we made several recommendations, sent it back to the work group. They made some revisions, came back with the final draft, and then we as the system management team approved the final product.

Q. How many people were on the system management team?

A. Oh, there – at this time – it's changed [13] again, and several times over the last year. So I mean as a rough estimate, I'd say probably 20.

Q. Twenty? Was Charles Simmons on that team?

A. Yes. He's the head of the management team, as the secretary.

Q. Was Roger Worholtz on that team?

A. Yes.

Q. Was this – where did you get the idea for this program?

A. I don't know where the idea specifically came from. I mean, it wasn't my idea. I didn't come up with it.

Q. Was it based on another state or another prison system's program?

A. As far as I know, there was not a system like it in existence prior to ours. We've had lots of inquiries since, that they want to develop and implement a similar system, but whether they have or not, I don't know.

Q. You don't know if other states have followed –

A. I don't know. I just know there have been inquiries. You know, they want copies of how we do it and that kind of thing. It's been [14] written up in lots of national publications.

Q. So as far as you know, the incentive level system that's used throughout – the Kansas penal system is the first one to use the incentive level system?

A. With – as this model, yes.

Q. As that model?

A. I mean, lots of them have their own kind of incentive programs and that, but along this kind of a format, this model, as far as I know, it's the first one.

Q. Okay. You mentioned that you approved that final product. Did you approve that actual document that was produced, then? Your system team?

A. Well, what we did – I mean it depends, I mean, how specifically you mean did we approve this document. I mean the secretary of corrections is the one that approves an IMPP and issues an IMPP and says, "That is the policy now. Follow it." The system management team – I mean, if you get down to it, I mean I guess we approve it, but obviously it's still subject to the secretary's final cut. I mean, he's the head [15] of the department.

Q. How does the – explain to me, if you could, the difference between the incentive level and custody classification.

A. The incentives and privileges system of levels is a process wherein we're trying to lay out those privileges whereby, given certain, I mean, positives towards the goals we want worked towards to reward and reinforce that. It's – custody is a function of trust and behavior and adjustment and discipline records and that. That custody is a function of direct control, if you will, to ensure the safety of the public and us and of them and of the other inmates.

Q. Is there some overlap between the two?

A. Overlap in the sense that both systems will look at some of the same issues, yeah. Yes.

Q. And there's four different incentive levels under this program, or are there five?

A. I always forget because it also includes work release and I never – or parole and I never deal with that. There are five.

Q. There are five. First –

A. Well, six, technically, because there's [16] intake and then I through V.

Q. Okay.

A. So there's six.

Q. Level I, is that the highest or the lowest level?

A. Intake is the lowest level. Then Level I is the next lowest, with – in an institution setting, then III is going to be the highest you can get to. Then IV and V deal specifically with parole, as you progress on through the entire system.

Q. So there are more privileges associated with the higher level?

A. Correct.

Q. Okay. So Level I would be the lowest level, would be the lowest amount of privileges that an inmate would be able to have?

MR. DOWELL: I'm going to object to that. That's not what the testimony was.

Q. (By Mr. Byrd) Well, let me ask you this. I'll rephrase the question. Is it correct that notwithstanding intake level, that Level I is the lowest level of privileges in the incentive system?

A. Correct.

[17] Q. Okay. When an inmate starts out, they start out at the intake level?

A. Correct.

Q. Are they then moved into Level I?

A. After they accomplish certain aspects, yes.

Q. Okay. And when you say "Level I," that's a Roman Numeral I, as opposed to a numeral 1?

A. Correct.

Q. Right. You use Roman Numerals.

When you're in Level I, does that tell you where you're going to be housed?

A. No.

Q. Are housing classifications based on incentive level?

A. In and of themselves, no. No, the level system does not say that, "At Level I, you'll live here or there." No, it doesn't.

Q. Where do most inmates who are at Level I live?

A. I've never really tracked that. We have some at the various facilities.

Q. Okay. Let's – unless I specify otherwise, I'm going to be asking you questions about Lansing, to make it easier for you –

A. Okay.

[18] Q. – and how the incentive level and the custody classifications are, how they pertain to Lansing.

A. Okay. Good.

Q. And I don't know if that affects your answer, but are most Level I inmates, are they in a certain housing – custody classification here at Lansing? For example –

A. I – go ahead.

Q. For example, are most Level I inmate – are there more Level I inmates in the maximum housing units than there are in medium or minimum?

A. Well, again, I mean I've never just printed out the numbers to say, "Where are each of them located?" I think it's probably a good assumption that more Level I's live in the maximum compound than live in the medium compound than live in the minimum compound.

Q. Do you use, as part of the incentive level program – I don't know if you refer to it as "housing classifications" – as part of one of the incentives that an inmate can earn? A privilege? Is a housing area or an area of the prison one of the privileges that an [19] inmate can earn, as they progress up the incentive level?

A. No.

Q. No, it's not. Okay. The earnable privileges are set out in IMPP 11-101, is that correct?

A. Correct.

Q. And those are located there at Number 1?

A. Right.

Q. Okay. Okay. So the only privileges that are involved in the incentive level system are television ownership, handicrafts, participation in organizations and formalized activities, use of outside funds, canteen

expenditures, property, incentive pay, and visitation? Those are the privileges that are laid out as what can be earned by an inmate in the system, is that correct?

A. Per the privileges and incentives program, yes.

Q. Attached to Exhibit – Deposition Exhibit 17 is what I'm going to refer to as Attachment A, and it's titled "Offender Privileges And Incentives Level System," and tell me if this is correct: This lays out the various privileges that an inmate in the program can [20] earn, is that correct?

A. Yes.

Q. For example, a person who is at the lowest level, Level I, he's not entitled to a television, is that correct?

A. I mean the lowest level is intake.

Q. Okay.

A. I mean –

Q. Okay. Intake – as opposed to someone who has not just been brought into the prison in the intake system, if a person is at Level I, that's the lowest level outside of those who are in the intake program?

A. No, no, we do have them here on intake level also. They're not new to the system. If they do not satisfactorily complete all the requirements to proceed up from intake, then they remain on intake.

Q. Okay. Do you have –

A. Just not – it's not just a function of "You're here. Now you're done with intake."

Q. Okay. And so that's the very lowest level, is that correct?

A. Correct.

[21] Q. Okay. Do you know about – do you have a rough idea of – about the percentages of inmates who are in the various levels?

A. No, I don't.

Q. Is there a majority who are in one level over some other level?

A. I would make the assumption that they're in Level – probably the biggest number is in Level III, because on implementation of this system, we grandfathered every single person in the system at the time to Level III. It's my assumption we've still got a majority on III.

Q. Okay. So when you started the system, everyone started out on Level III, is that correct?

A. Correct.

Q. And then –

A. The day we implemented the system, everybody started on level I. The people that walked in the door that day, the next day, are on intake level. But anybody in the system was grandfathered to Level III.

Q. Okay. Do you know when the system – that was – was that January 1st, 1996?

[22] A. Right.

Q. That would be the first day? So on January 1st, 1996, everyone started at Level III?

A. Right.

Q. Okay. Are you familiar with Robert Lile, the –

A. Yes, generally.

Q. Generally? Do you know what level he's currently on? What level of the system he's on?

A. No, I don't.

Q. Okay. At some point, some of the inmates are moved off of Level III and are moved to different levels?

A. Correct.

Q. Lower levels, correct?

A. Correct.

Q. What would be some of the reasons they'd be moved to lower levels?

A. Well, again, in the IMPP, there's a list of different reasons on progression and demotion, if you will. I don't remember what they exactly phrase it. But it applies to whether or not they're working, whether or not they're in their programs, whether or not [23] they've gotten disciplinary reports, whether or not they've gotten fired from their work for reasons of their own cause. Those are probably some of the main reasons. The general adjustment issues are what causes –

Q. Okay. To make sure I have this straight, let me go through this. You can be moved to a lower level in the incentives program because of a disciplinary problem?

A. Yes.

Q. You can be moved to a lower level in the incentives program because you refuse to work in a work program?

A. Yes.

Q. You can be moved to a lower level in the system because you refuse to take a recommended program agreement?

A. Yes.

Q. And you can be moved to a lower level because you attempt to escape?

A. Depending on how you processed it and all, then yeah. I mean, most likely you could.

Q. Okay.

A. Because there's another list in there that – charges that would – that also include other

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[27] A. It's – yes, it's the least privileged level.

Q. Least privileged. And then Level I is the second least privileged?

A. Correct.

Q. And then Level III is the highest, or is Level IV the highest privileged level?

A. Level III would be the highest privileged level within an institution.

Q. Within an institution. Are there any Level IV inmates here at Lansing?

A. Not that I'm aware of.

Q. So the highest level here in the prison is Level III?

A. Would be a III.

Q. Okay. We were talking about the level system and housing arrangements. How are housing classifications determined? Is it based on the dangerous nature of the individual?

A. Well, housing is going to be several different issues. I mean, it's going to be involved in what their custody is. Sometimes – I mean it will depend on what their medical condition can be. Because, I mean, proximity to a clinic. It can be [28] just – I mean we have – we have some medium housing in the maximum unit. We have some minimum housing in the medium unit. And so, I mean, it's not strictly a custody definition of which facility or which unit you're going to live in. And within the – within the custody unit, like the max unit itself, the primary determiner would probably be by custody, whether you can life in medium custody housing or in maximum custody housing. Some of that will also depend on your current status at the time, restrictions. Inmates live in one place, workers live in another place. Some of our UACs – we're transitioning right now, trying to decide whether we want all the UACs to live in one place or if we want to keep them divided up among the population or not. So we're trying to decide that. So there are several factors that determines where you will live.

Q. What is – when I – explain to me what the medium facility is here at Lansing.

A. Okay. We have – the old original KSP is the maximum facility here, and that is behind the [29] walled, stone-walled perimeter. That's generally referred to as our max unit, although – because the majority of the cells in there are maximum security, although there are some medium housing cells in there as well. Then also then, the medium unit was –

Q. There – excuse me.

A. Uh-huh.

Q. You said there are some medium cells –

A. That are in the max facility.

Q. – in the max? Okay.

A. Right. And so I mean that's why we generally refer to it as the max unit, because the majority of the cells are max cells.

Then adjacent to it, contiguous, is the medium unit. The one housing unit, Q, is an older dormitory building, so it's been around a while. But generally speaking, the medium facility was opened in 1985. The majority of the cells in there are going to be medium security cells or medium security dormitory, as in Q. We are – we do have some of the cells in Q – or in K, L and M designated as minimum custody also. So, I mean, you can have some medium in the max, [30] you can have some minimum in the medium. But generally, because of the majority, we just refer to it as the max unit, the medium unit, the minimum unit. The minimum unit is all minimum.

Q. You are talking about the maximum security facility being behind the stone walls.

A. Uh-huh.

Q. Are you familiar with the phrase "being rolled behind the walls"?

A. Yeah, I – that's a –

Q. What does that mean?

A. – phrase that they use. Being rolled is when you're going to get moved. You can get rolled from the hill, would be another phrase you'll hear here. And because our east unit is our minimum custody unit, which used to be the women's prison for the state, and it sits over on the hill, over on Highway 5 – and so generally, when you hear about getting rolled, you're getting moved back to one of the other units, so you get rolled from the hill, generally. You'd be going to the medium or the max. Generally, if you're being rolled from the medium, you're going to [31] go back to the max unit.

Q. So to be rolled behind the walls would be to move –

A. To move to the max unit.

Q. – to the max unit?

A. Right.

Q. Okay. I want to ask you some more questions about this IMPP 11-101. The eight privileges that are listed, the earnable privileges, one of them is "Participation in organizations and formalized activities." Could you explain what that involves?

A. Right. There's – on the chart for the details, it will list exactly which ones those are, but basically we're talking about participation in different organizations like Jaycees,

Seven Steps, Upper Room, some of the cultural groups, AAO, Chicano. Those are examples.

Q. So as you progress – if you go from a higher level security – or excuse me, incentive to a lower Level I, you would lose the opportunity to participate in those activities?

A. Correct.

* * *

[57] facility?

A. Well, not necessarily.

MR. DOWELL: I'm going to object to the form of the question. I think that the way that the question is worded, you're asking, first of all, they are putting people in a spot because the people want something else.

MR. BYRD: Let me rephrase the question.

Q. (By Mr. Byrd) My understanding is that there are medium custody inmates who are housed in the medium – or excuse me, the maximum security facility. Is that correct?

A. Right.

Q. Okay. What are some of the reasons why they are housed in the maximum security facility?

A. Okay. Some of them are because when they got their – they were at max custody and they got their medium custody and we have medium custody beds in there and some of them – I mean the whole – there's a whole variety of reasons of why they're still in there. Some of them is because they want to stay in there. And we have a lot of inmates that [58] want to stay in the max unit. We have some inmates that want to go on the

medium unit, and it remains pretty full, and so for those cases, they're waiting to get to the medium. We have some inmates that live in the max unit in medium beds because of the various programs they're in, because of the jobs they're assigned to and that's where they live. And so there's three or four reasons to live there.

Q. You mentioned they may –

A. Access to the clinic is another big one.

Q. Sure. One of the reasons they may live in the max unit is because of a program they're involved in. Could you explain what type of programs you're talking about?

A. Oh, they could be assigned – we – it's like we're going to open the whole therapeutic community for substance abuse. Those will all be medium, max, and minimum beds in there. They could be in that. And we're making arrangements to move them in. We've got certain inmates in, oh, – some of the inmates in special ed live in the max unit, just stay in there. Sometimes some of the [59] ones that live in the medium we allow to go back and forth. We try to keep that minimized, the number of inmates that live in one unit and go into the other unit. And so they might be – they could be in any one of the programs. We have SATP. They could be in ADAPT. They could be in special ed. They could be in regular ed.

Q. If you're in the SATP, you're not required to live in the maximum unit, are you?

A. No.

Q. Okay. Now, this – back to Deposition Exhibit 20, I guess what's confusing is that are people who live in the

maximum security facility, are they the ones who are the maximum people for purposes of their visitation restrictions?

A. No. No, they are maximum custody inmates. And that's why we have the footnote here that medium inmates living in the single cells in the max unit visit in the same area and times – oh, I'm sorry, I misread it. They do visit. I'm sorry. I was wrong. I thought they visited the same as the mediums.

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[61] A. Those are all medium – well, I shouldn't say they're all. It would be either medium or minimum. We do not put maximum custody inmates in multiple-occupancy cells.

Q. So if you're a maximum custody inmate, you have your own cell?

A. Yes.

Q. Okay. So according to this schedule you laid out on your February 12th memo, a person, simply because they're living in the maximum facility, is – but they're a medium custody inmate, they may still have medium visitation visiting rights, is that correct?

A. Correct.

Q. Okay. And C-2 is in the maximum facility but the inmates in that are medium custody, is that correct?

A. Correct.

Q. Okay.

A. Correct.

Q. Where are Q, K, L, and M?

A. Those are the ones that are in the new – the newer medium unit that was opened in 1985. Q dormitory is the open dormitory that is indeed one of the older buildings that's been

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[64] participate in a program will not get you points to change your custody.

Q. Then what was – what are you thinking about when you said that you thought it could affect?

A. When you get to some of the exceptions and as the incentive program overlaps to it, then sometimes, yeah, you can lose your custody because of the other issues.

Q. One of those issues being –

A. Usually through the exception process.

Q. Okay. Let me try and design a hypothetical to sort of flesh this out, because I'm still very uncertain about this.

If you're a medium custody level inmate and you started out at Level III, where everyone started out, and you refused to enter into your program agreement, what happens to you?

A. Medium custody inmate living in the medium unit –

Q. Right.

A. – Level III? In the level system, then refusing to enroll in the program, you will lose a level, and – and per

our policy, then [65] we will move you into the maximum unit, to one of the medium beds over there, if that's where you stay, in medium custody. It's possible you could also lose your custody.

Q. You could also be moved up to maximum custody?

A. Yes.

Q. How – at what point is that determined? You mentioned it was possible. How is that possible?

A. That would depend on probably the rest of the behaviors and what all else was going on in the situation. If it's a volatile kind of refusal, I guess. And so you get into the other – to belligerence, misbehaving, those kind of things.

Q. For example, if an inmate is a medium custody inmate in a medium facility at Level III and refuses to enter into the program agreement, it's possible that – well, he will be moved into the maximum facility but into a medium bed?

A. That's possible. Right now we're going through a process to study and determine whether or not we are going to have it

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[70] Q. You state in here that one of the reasons it's preferred is the nice gymnasium, the open yard area and the individual rooms within the pods of K-L-M units.

A. Uh-huh.

Q. You mentioned earlier that they're going to be double-bunked rooms, they'll no longer be individual rooms.

A. Right.

Q. Okay. But –

A. The open yard, what I'm referring to there is I mean they have a yard in both the max unit and in the medium unit. There's a yard in each, per se, but in the max unit, it's more of a schedule on what's – what cell houses can get out to go and when they can get there. They can go at different times during different days. The open yard schedule I was referring to in that memo is that just anytime the yard is open, the inmates in the medium can go. So it's – it's more open, more accessible.

Q. Okay. So for example, an inmate who is in the medium unit has more access to the open yard and the outside than an inmate in the [71] maximum facility, is that correct?

A. Correct.

Q. And that doesn't depend on the inmate's medium custody status in either of those two units?

A. Correct.

Q. Okay. So a person with medium custody status who is housed in the maximum facility, his access to the yard and to the outside is far more restricted than the person who's in the medium facility, is that correct?

A. Yeah, it's more restricted. I mean "far"?

Q. Okay. It's more restricted?

A. Yes.

Q. According to your memorandum of March 23rd, 1995, "Inmates refusing to participate in programs and who maintain their medium custody shall be housed in C-2." We've talked about C-2. Is that C-2 that's in the maximum facility?

A. Correct.

Q. But it's – those are medium beds?

A. Correct. That's those multiple-man, four-man cells.

Q. Okay. So if an inmate who, at the time this [72] memo was put out, was in the medium facility and had his own individual cell, if he refused his inmate program agreement or the programs recommended, he would be moved to a multi-occupancy cell in maximum facility?

A. Correct.

Q. Okay. Is this a program that's still in effect?

A. Yes.

Q. Okay. Next I'm going to show you Deposition Exhibit 18 and Exhibit – Deposition Exhibit 19. I'm going to see if you're familiar with those.

(Witness reviews material.)

A. I know what they are, but I couldn't swear I've seen them before. But I mean I know what they are. I know what they're doing, yes.

Q. (By Mr. Byrd) Are they, as far as you know, something that are in effect now?

A. Yes.

Q. Now, could you tell me what Deposition Exhibit 18 is?

A. It's a memo from Danielle Wagner, who is an Activity Specialist I. It's just to all

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[84] prison, the prison system in Kansas?

A. I mean in a general sense. I mean –

Q. In a general sense? Are you familiar with – I'll cite to you Kansas Regulation 44-5-105(c)(1) that says that an inmate shall not be punished for refusing to enter into a program.

A. Uh-huh, yes.

Q. Okay. Could you explain to me, is it a punishment for an inmate to be moved from the medium facility to the maximum facility and the incentive level systems? Are those punishments?

A. No, we do not view them as punishments.

Q. You don't view them as punishments? Why not?

A. No, we don't. What we have is those are certain privileges that are available for them to earn, and they earn them through their positive interaction, their positive participation, their positive behavior, their positive accomplishments in this institution. And the – the difference is that – between punishing someone for some act they commit versus a choice, a decision [85] they make not to do something which then does not earn them additional privileges or the right to keep privileges that

we have granted in the past. Because privileges are something that we can take and give, based on their actual behavior, their actual actions at the time. Punishment is something you do to someone for something they do, not the positive – not the decisions they make for which there are consequences.

Q. Okay. So you're distinguishing a punishment on the basis of whether the person does an act? Is that correct?

A. I think in a nutshell, that's – that's close, yeah.

Q. Couldn't a person be punished here in your prison for failing to act in a certain way? I'll give you an example.

A. Yeah, I –

Q. If a prisoner was told to leave a specific area and he just didn't, he could be punished for that?

A. True, true. Disobeying an order. So in that sense, it's not doing something and it's a – it's a negative sanction that we apply to [86] them and it's something that we're doing and I – you know, I don't know. I mean is it – trying to distinguish between the two, I mean, can be difficult, but I mean it's the difference between something that we do to them as a result of this action or inaction as opposed to there are consequences to choices in life, and whether or not you earn a privilege or whether or not you retain a privilege and the difference between some other punishment that's meted out.

Q. Why isn't – so you're saying that if a person refuses to enter into a program, that your removal of them from the medium facility to the maximum facility is

a consequence of their action to refuse to enter the program and it's not a punishment?

A. Correct.

Q. Why isn't that just simply a semantic choice of how you want to apply a label to a certain action?

A. Well, I – because there is – I mean there is – before we take punitive actions on individuals, before we take punitive actions on inmates, there are processes to do that, [87] and – and punishment is those things over and above – it's putting people in disciplinary segregation, it's doing the other kind of things that actually mete out discipline.

Q. Is this – is this just –

A. This is a –

Q. – a variation in degrees? I mean of punishment being – are you only limiting punishment, as you understand punishment, to a disciplinary process?

A. I'm not sure. But always exactly tied to the disciplinary system and its official capacity? I don't know. I'm just saying that this isn't punishment. I mean I don't see this as punishment. These are actions that – decisions they make, and there are certain – although they may be negative consequences, there's a difference between negative consequences and being punished.

Q. Okay.

A. Sometimes you lose the privileges you had or you don't earn additional privileges because of choices you make, and that's one of the things we emphasize. I

mean that's a large [88] part of the incentives and privileges program. It's a large part of our whole accountability and responsibility management training. It's a large part of everything we do is teaching accountability and responsibility and that there are consequences for choices.

Q. You state in response to Interrogatory Number 6, from Deposition Exhibit 23, that, "Disciplinary action through the use of the disciplinary process is not taken for refusal to participate in SATP programs." Why isn't it a fair characterization for an inmate to say that he's being disciplined for refusing to enter into an SATP program, when you move him from medium facility to maximum facility and all the attendant loss of privileges? Why is that not a fair characterization?

MR. DOWELL: I'm going to object to the form of the question. You're saying moving from medium to maximum –

MR. BYRD: Well, I'll rephrase the question.

MR. DOWELL: With all of the attendant loss of privileges, and you're [89] getting apples, oranges and bananas all screwed up in the question.

Q. (By Mr. Byrd) Okay. Well, let me try and – I'll try and explain it. It will be a long question.

When a person who's in medium facility refuses to enter into an SATP program, as I understand what we've talked about today, that person, because of their refusal – and correct me if I misstate anything – will be moved into the maximum facility from a two-person cell that has a

door and a key that he can go to into C-2, which is a four-person cell. Is that correct?

A. C-2 is a four-person cell, yes.

Q. But so far I'm correct in stating that if he refuses, that's what happens to him, correct?

A. Not necessarily. I mean because – I mean you're saying he's going from this two-person room with a door, on and on, and he could also be in Q dorm which is just a wide-open dormitory, multiple-man, wide-open bunking –

Q. Well, let's use Robert's situation, Robert [90] Lile, who is – who you note in your interrogatory responses is in M unit, which is – that's a unit that has a door and a key and it's in one of the pods with the common areas.

A. Right.

Q. If Robert refuses, he's moved into the maximum facility into C-2, according to your March 23rd, 1995 memo, correct?

A. Correct.

Q. Okay. And as part of that move, his access to the yard is restricted, isn't that correct?

A. Yes.

Q. He will have his incentive level – he will go from whatever incentive level he's at now, which I believe is Incentive Level III, he will go up to Incentive Level II and he will have his canteen expenditures limited, he will have his incentive pay possibly limited, he will have his organizations and formalized activities limited, he will

have handicrafts will not be available, and he will have a limitation on his outside funds. Is that correct as well, if he refuses to enter into [91] the SATP?

A. All with the exception of the limitation on outside funds. I don't think that one is.

Q. Oh, okay. All but that one?

A. Right.

Q. Why are – why isn't it fair for Robert to consider that a punishment or a penalty because he loses those things because he simply refused to enter into the SATP?

A. Because of the system of accountability and responsibility that we follow. Then what the difference is, again – I mean, I don't know how to describe it much better, but the difference between punishment and the privilege process is whereby when you make a choice, you're knowingly making a choice and a decision that those are the things you won't get anymore. I mean I don't know how else to say it.

Q. Okay.

A. I mean there's a difference between punishment and not earning privileges.

Q. Okay. Who determines – under that Kansas regulation I cited to you, who determines whether that regulation has been violated? [92] Do you know? Is there an administrative hearing or is that – are you the one who would make a decision on that?

A. Well, it would depend on where the issue is. When it comes to the incentives and privileges system in

its entirety, then I assume the secretary and the chief counsel have been over it and have determined it's in compliance with KARs. I have the responsibility at this institution for a living unit rule or for general orders or for policies that I issue that I make that determination. I mean, who ultimately makes those determinations is open.

Q. Did discussion of that KAR 44 dash whatever that I cited, did that come up in your team discussion when you were planning this incentive level system?

A. As best I recall, it did. I mean I couldn't say by the number that's what we talked about. I mean we talked about all the issues. We talked about privileges and the loss and we talked about programs and voluntary and all those issues. And we talked about – I mean, I don't know how many [93] KARs, how many IMPPs and general orders. We changed a lot of them through that whole official process.

Q. Okay.

(Off-the-record discussion.)

Q. (By Mr. Byrd) Okay. You mentioned earlier in the deposition that the administration was considering whether inmates who refused to enter into a program would lose their custody status. Do you recall that?

A. Correct.

Q. What are the – what's being considered there? That they want to have a rule that says, "If you refuse to enter into a program, your custody status will change"?

A. I'm not real sure of all the parameters of the group. The group is just being formed, just being appointed, and I'm not – I'm going to be one of the people on that group, but we don't have our charge yet and I just know, I mean, that's one of the issues that that group is going to be looking at is, do you leave people in minimum custody.

Q. Do people in the C-2 cell house that you mentioned in your March 23rd, 1995 memo, do [94] those people, can they work, can they have jobs?

A. In C-2?

Q. Yeah.

A. Yes, they can.

Q. Okay. I want to ask you some questions – is the maximum facility, as a whole, considered more of a dangerous or threatening area than the medium facility?

I mean, I don't know. I mean, that would be hard to say. I mean, I have – I mean, I can't tell you the number of assaults in either one or the other, just off the top of my head. I mean, I can tell you we have them in both and, I mean, is either one more dangerous than the other one? I mean, I really couldn't say.

Q. So you don't have an opinion?

A. I – I just – I'm not sure there's enough differences between the two to say one is more dangerous than the other. I mean, they both have long-term, they both have violent offenders, they both have all kinds of nooks and crannies and hiding spots, and I have assaults in both of them.

[95] Q. Let me ask you this: Maximum custody inmates generally are the more dangerous convicted felons?

A. Well, I –

Q. There are more first-degree murderers who are maximum custody inmates, is that correct?

A. No, I don't think you can say that either. I don't think that would be accurate. I'm not sure. I mean, I've not counted them, again. Because custody isn't just a function of your crime, it's also a function of all of the other points and some of that just is a matter of how you're adjusting, what you're doing, how much time you've got served, all those things. I mean, I have murder 1's living out in the minimum unit.

Q. If a person has what is referred to as a Hard 40 –

A. Uh-huh.

Q. – are they generally going to be a maximum custody inmate?

A. Well, there again, I mean it depends on when they got it and how far into the system they are and what their behavior has been. I mean –

[96] Q. I'm asking you in general.

A. I can't – well, in general, you can't do that. I mean, it's not determined by are they a Hard 40 or not. It's not determined by are they a lifer, are they a murderer, are they a rapist, are they a check writer. there's just too many other factors coming into play that I can't tell you that generally the dangerous ones are in the max

unit. I mean, if we have a minimum custody inmate run off from a minimum custody downtown work crew, we put out the flyers and we tell them they should be considered dangerous. So – and that's whether they're check writers or robbers or murderers.

Q. People – you've mentioned people were assaulted in both medium and maximum custody. Were you here when – are you familiar with the guards who were killed in 1994 in the rec shed?

A. The one officer was killed there, yes.

Q. Or one officer.

A. 1993.

Q. Was that in the medium or maximum facility?

A. That was in the max unit.

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[100] Q. Okay. You don't know if or when someone was killed in the medium facility since you've been here?

A. I'm not aware of anybody being killed in there, no.

Q. Okay. Would you disagree with an inmate if they said, "I don't want to be in the maximum facility because I think it's more dangerous and I fear for my life there"?

A. No, I don't think they have a valid claim.

Q. And why is that?

A. Because I don't think it is.

Q. You don't think it's more dangerous?

A. I think you're – I think you can be in just as much danger in the medium as you can be in the maximum.

Q. You don't think that the type of inmates who are housed in the maximum facility have committed more serious crimes than those who are in the medium facility, on the whole?

A. I – I mean, if you actually went and surveyed who's in there today, I'm not sure what it would show, but, I mean, I just know that I have the full spectrum of crimes, the full spectrum of sentences on – even clear [101] on down to my minimum honor camp, if you will, at Osawatomie. And so to say that the inmates in the max have more serious, more dangerous crimes, then I can say no, I don't believe that.

Q. So you would disagree – Roger Worholtz, if Roger Worholtz said that the more dangerous felons were in maximum security, your testimony is you disagree with him?

A. Well, the difference is, if you're saying – I mean, is it more dangerous to live in the maximum unit or to live in the medium unit, then I don't know as there's a big enough difference that you can do that. You have inmates in the maximum unit that have – I mean, there's other reasons, as well, to be in the max unit. Some of them are because of control issues. Some of them are because if I take that same murder 1 life sentence and I can – if I walk through and show that it's just a – a high public profile kind of crime and it may have been some – oh, I don't know, some – some spur-of-the-moment thing, you know, the guy's not – he may go through the whole

reception process and not be a [102] dangerous type, other than this spur-of-the-moment crime, but nonetheless, we think we could probably trust him in a lesser setting. But if you put him out there and he does something wrong, we can't take that kind of heat from the public because how in the world can you put a brand new life sentence murder 1 in the public where he has access to do something like that, to run off. So sometimes it's the public perception, sometimes it's general protection kind of issues that you – you may or may not be more dangerous just because of the crime. And so –

Q. Let me give you an example of an inmate and you tell me where, in general, without knowing anything more, he would most likely be. A person who's committed first-degree murder who has gotten in several reported fights in the prison, who is known among the guards as having a belligerent and volatile attitude and being very angry, has committed several prison violations. More likely than not, he'd be in the maximum facility, wouldn't he?

* * *

[120] were convicted, the sexual offense? Is that what you're understanding is?

MR. DOWELL: Object. That's not what the form talks about, and the witness has indicated that he hasn't seen the form, so you're asking him to speculate.

Q. (By Mr. Byrd) Is that true? You've never ever seen the –

A. I don't recall seeing that form.

Q. You don't recall it?

A. I mean –

Q. Is it possible that you've seen it at some time?

A. It's possible.

Q. Okay.

A. I just don't remember having seen it. I mean, I would not want to say absolutely I've never seen it and you walk in and say, "Aha. Ten years ago, you initialed this sheet." So I don't recall ever seeing one.

Q. The acceptance of responsibility form, an inmate may not want to sign that because their case is on appeal. You'd agree with that, wouldn't you?

A. Yes.

[121] Q. Okay. And you've talked about a person – an inmate's decision to enter into the SATP program and other programs as their choice, is that correct?

A. Yes.

Q. You refer to it as a choice?

A. Yes.

Q. All right. And that they must deal with the consequences if they refuse not to choose to enter into the program.

A. Correct.

Q. And that's how you see the incentive level system, correct?

A. Correct.

Q. You'd admit, then, that there's a price that they have to pay for making that choice, wouldn't you?

A. There are consequences of that choice, yes.

Q. Okay. So it's not a completely free and unfettered choice, is it?

A. Are there any?

Q. But –

A. I mean, there's consequences to every choice you make in life, and there are consequences to that choice as well.

DEPOSITION EXHIBIT 21

[LOGO]

KANSAS DEPARTMENT OF CORRECTIONS
INTERDEPARTMENTAL MEMORANDUM

DATE: March 23, 1995
TO: All Concerned
FROM: David R. McKune, Warden
SUBJECT: HOUSING OF MEDIUM CUSTODY INMATES

The Medium Facility has long been recognized as a preferred housing location for inmates with medium custody due in part to the nice gymnasium, open yard area and the individual rooms within the pods of K-L-M Units. It seems quite reasonable to expect that inmates who are responsible enough to live there to be responsible enough to participate in their program agreements and/or program plans. Based on this belief the following new policy is to be implemented:

Effective May 1, 1995, inmates that refuse to participate in recommended programs on their IPA or IPP will not be allowed to move to the Medium Facility. Those already housed in the Medium Facility shall be offered the opportunity to participate in previously refused prograsm [sic] at their next regularly scheduled 120-Day Review. Inmates refusing to participate in programs and who maintain their medium custody shall be housed in C-2.

DRM/MN

cc: Deputy Warden-Programs
Deputy Warden-Operations
Deputy Warden-Support Svc
Major
All Inmate Bulletin Boards
All Unit Team Managers
File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE, Plaintiff, -vs- DAVID R. McKUNE, et al., Defendants.) Case No. 95-3266-DES

THE DEPOSITION OF CHARLES SIMMONS, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Wednesday, November 13, 1996, at the Kansas Department of Corrections, 900 SW Jackson, Suite 400-N, in the City of Topeka, in the County of Shawnee and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[4] transcript and point out the inconsistencies?

A. I understand.

Q. I'd ask if you don't understand a question, will you let me know?

A. I will.

Q. And then if you answer a question, I'm going to assume you understood the question. Is that fair?

A. That's fair.

Q. Where are you employed?

A. State of Kansas, Department of Corrections.

Q. What is your title?

A. I'm Secretary of Corrections.

Q. What is your educational background?

A. I'm a graduate of Kansas State University in 1973 with a BS in political science, and a 1976 graduate of Washburn University School of Law, and I was admitted to the bar in September of 1976.

Q. Are you still an active member of the bar?

A. Yes, I am.

Q When did you go to work for the Department of Corrections?

A. I began work for the Department of [5] Corrections as legal counsel for the, what was then called, Kansas State Penitentiary in February of 1979.

Q. Did you job title change, over time?

A. Yes, it did.

Q. Just give me the highlights.

A. In February of 1981, I moved to the central office here in Topeka as a staff attorney. Became Chief Counsel for the Department in 1983. Served in that capacity until being named as Acting Secretary of Corrections in August of 1994, and then later as Secretary of Corrections in April of 1995.

Q. So you've been head of the Department of Corrections since '94?

A. Since August 19, 1994.

Q. I think I just made an assumption. Are you the Secretary of the Department of Corrections?

A. Yes, I am.

Q. Is there anybody within the Department of Corrections who is your boss?

A. No.

Q. Are you – is that an appointed position?

[6] A. Right. That's an appointed position as a member of the Governor's Cabinet. The appointment is made by the Governor.

Q. What are your duties as Secretary of Corrections?

A. General management and supervision responsibility for all of the activities of the Department of Corrections, including facility operations, parole supervision, oversight of community corrections programs.

Q. As Secretary of the Department of Corrections, what is your role with respect to the Lansing Correctional Facility?

A. That's one of the correctional facilities that is under the supervision, the overall responsibility of the Secretary of Corrections.

Q. Does the warden of Lansing report to you?

A. He reports directly to the Deputy Secretary of Facility Management, and that individual reports to me.

Q. And do you have overall responsibility for – ultimate responsibility for all of the programs run in the corrections system?

A. Yes.

* * *

[17] Facility to all concerned regarding the housing of medium custody inmates.

Q. (By Mr. Rebein) Have you seen that before today?

A. Yes, I have.

Q. Did you receive a copy of that when it was issued?

A. I'm not listed as having received a carbon copy, but I do recall having seen this. Exactly when, I – whether it was contemporaneous with its issuance or not, I can't say right now.

Q. Who drafted that memorandum?

A. Well, the initials here are – it's a memorandum from David R. McKune, and the initials behind that are "MN." My guess is that that is Mike Neve, who is the classification administrator at Lansing Correctional Facility, but I don't know that for a fact.

Q. Is it your understanding that what this memo is saying is that if a person does not agree to enter into the SATP program, that they could be moved from medium security to maximum security?

[18] A. Their housing assignment would be changed. If they are in medium security and did not agree to participate in sex offender, they could be relocated. If they were in another housing setting and did not agree to participate, then they would not be moved to this medium security facility.

Q. Were you involved in any discussions with Mr. McKune before he issued this memorandum about this subject?

A. My recollection is that I was, yes.

Q. And I take it from the fact that it was sent out, that you approved of that.

A. This memorandum is not inconsistent with the discussion that I had with Mr. McKune.

Q. What's the purpose of tying the inmate's housing arrangements to their participation in the SATP?

A. That's a location where the – what we try to do in the system is place people in housing areas that are suitable for their program participation as well as their custody level, and also whether they participate in work. If an individual does not want to participate in programs or participate in work or other [19] assignments that they have been given, then they don't – don't earn the right or the opportunity to earn certain privileges or certain locations to live.

Q. So is the purpose to give an inmate an incentive to enter into the SATP or other program by making the living arrangements of that inmate contingent upon that participation?

A. That's a part of it, yes.

Q. And who came up with this idea?

A. That's – I don't know a specific person that came up with that idea. That's been the department's overall philosophy of offenders being accountable and responsible for their conduct and earning the privileges that they receive. That's been the department's policy or policy direction for a number of years.

Q. What's you understanding of "punishment"?

A. That's a pretty broad question. In what context?

Q. In the corrections context.

A. We have a disciplinary procedure, disciplinary process that we use to impose punishment, and that occurs – we have [20] certain rules that are in place that are issued to inmates. We expect compliance with those. Where there's an apparent violation, there's a disciplinary report written, there's a hearing process and a determination, and if guilt is determined or there's an admission of guilt, then there are sanctions that are imposed as part of that. And it's all through a due process proceeding, and that's the way we impose punishment.

Q. So punishment would be – would you agree that it's an adverse consequence of failing to do a certain action?

A. That cons – if that action that they fail to do constitutes a violation of the rules that have been published, then there certainly would be an adverse consequence to that.

Q. Are inmates who don't obey the rules at the Lansing Correctional Facility punished?

A. Yes.

Q. And how – in what ways are they punished?

A. Well, they're – depends on the classification of the disciplinary rule that they violate. There are three [21] classifications. Level I is the – or Severity Level I is the most severe violations and Level III the least severe, and there are sanctions that go with each of those.

For example, there might be a disciplinary segregation imposed. There might be a forfeiture of earned good time credits. There might be a fine imposed. There might be a loss of privileges, specific privileges, for a period of time. There might be extra work imposed. And all of these are for varying lengths, depending, again, on the severity of the disciplinary rule violation.

Q. Tell me about segregation as a form of punishment.

A. An individual, if they were found guilty of, say, for example, a Level I disciplinary violation, they could be assessed a period of disciplinary segregation. I think the rule provides for 45 days for a single offense, is the maximum.

What that means is they would be placed in a separate housing area, they would [22] be confined to their

cell essentially 23 hours a day, they would lose all of the privileges that they have. It's a punishment, it's an austere environment, and, you know, you live in your cell, you eat in your cell, you're released for showers, and you're released for a period of exercise.

Q. So you would agree, then, that a change in a person's housing inside the institution is used as a form of punishment?

A. Through the disciplinary process, it is, yes.

Q. You also mentioned a loss of privileges. What type of privileges are taken away as punishment?

A. Could be a – well, there are – we have what we call an earned privileges program now that we implemented last January, January 1st of 1996, where inmates earn privileges and there's an orientation level and then three levels after that. And you can earn privileges over a period of time in each of those. If you fail to participate in work or programs or incur disciplinary violations, have a bad attitude, those sorts of things, [23] you can go back one level or two levels and that's all outlined in the earned privileges system.

So there's two different ways, in answer to your question, that that could occur. One is through the earned privilege system and losing privileges by going back a level or two levels, depending on where you were, for the things I indicated. A second way to lose privileges is as a sanction through the disciplinary process, where for a period of 30 to 60 days for a violation you might lose your electronic equipment, you might lose an opportunity to go to the canteen for 30 or 60 days, those kinds

of violations, as a specific sanction through the disciplinary process.

Q. So you would agree that taking away privileges that have been earned is used as a form of punishment inside Lansing?

A. Through the disciplinary process, it's a form of punishment, yes.

Q. And could you just list for me some of the privileges that you're familiar with being taken away, as a form of punishment? I think [24] you mentioned use of electronic equipment. Could you just list some others for me, please?

A. Are you asking that in the context of the earned privileges program or are you asking that in the context of disciplinary sanctions, or both?

Q. Both, since I don't know.

A. Okay. Through the – the earned privileges program has about nine or ten different privilege categories that offenders can earn from one level to another level. Electronic equipment is one. Opportunity to – expenditure limits at the canteen is another. At different privileges, different expenditure amounts can be made. Visitation is tied to the earned privileges program in terms of hours of visitation. How much you can earn at your assigned job is tied to the earned privileges. At certain privilege levels, you can earn maximum amounts, until you get to the highest privilege level. Then you can earn the highest wage that's possible.

There are certain jobs within the [25] facility, like those with Correctional Industries, that are tied to the

earned privilege system where you have to be at the highest level in order to get those, what we would term, more lucrative job assignments because they pay more.

Those are some examples of the earned privileges. The disciplinary sanctions would be with respect to what equipment you could have in your cell, whether you get the opportunity to go to the canteen to buy things or what things you might be able to buy. There might be a privilege restriction that limits you to basic hygiene items that you could buy from the canteen as opposed to other – like pop or candy or cookies or whatever that you wanted to buy at the canteen. Those would be some that might be imposed through disciplinary sanctions.

Q. Has anyone – have you ever had an inmate who was punished in the disciplinary system by being moved from a medium security facility to – or not "facility" – housing to maximum security housing?

[26] A. Very definitely. A serious disciplinary violation will, we use the term, "bust your custody." It will cost you your custody. And by our classification procedure, you will get sufficient points with that disciplinary violation that it will result in your classification being moved from minimum to maybe even maximum, but certainly from medium to maximum if you get that sort of disciplinary violation. And once your custody is busted, we would not let any inmate who's now, by our classification system, at a higher custody level continue to live in a lower custody setting.

Q. Have you heard about any sex offenders in maximum security, who are housed in maximum security, who were raped in the last five years?

A. I don't know of any by name, no.

Q. Have you – are you familiar with anybody claiming that they had been raped while housed in maximum security because of the fact that they are a sex offender?

A. I don't believe so, no.

Q. You don't take that into consideration at all [27] in your – let me back up.

Do the inmates know what other inmates are convicted of?

A. Only if those other inmates tell them or someone else would tell them. It's not anything that we make known.

Q. Why not?

A. Because it's – it's none of their business. You know, we specifically requested a provision in the Open Records Law that says inmate records are not subject to release to other inmates. That information could cause some problems in management of the facility.

Q. Is one of the problems that sex offenders – in particular, child molesters – could be subject to violence by other inmates?

A. Well, the potential is there for any inmate to be subject to violence by other inmates. You know, the conventional wisdom has, you know, always been that there are – is a hierarchy of offenders in a prison environment and that sex offenders, particularly pedophiles, are at the low end of that hierarchy in the prison environment. Whether that's actually true or not or [28] whether that's

a, you know, long-standing myth, I'm not prepared to say. You know, I don't know – I don't have any information to indicate that sex offenders are singled out to be subjected to violence or rape in a prison setting, and I don't know of any studies that this department has done historically to prove or disprove that particular theory.

Q. Would you agree that it's – I think you said "common wisdom." Would you agree that that is known among the inmate population, that common wisdom you talked about?

A. The – I don't understand the – the common wisdom about what?

Q. About pedophiles being at the low end of the hierarchy as far as inmates go.

A. Again, I don't know if that's the reality or that's a – you know, an understanding that that's the hierarchy. You know, that's a – what I meant by that is, that is a commonly stated perception, you know, among staff and others in the public that I've talked to. We've not done any studies that I'm aware of within the department with respect to inmate [29] attitudes to confirm or disprove that particular theory.

Q. Would you agree that maximum security is a more dangerous environment to live in than medium security?

A. I would – I would agree that the potential is greater for violence in a – or danger in a maximum security.

Q. And is that because that's where the more violent inmates are housed? In maximum security?

A. The more violent inmates would either be in maximum security or they would be in a special management setting where they would be totally segregated from the rest of the prison population.

Q. When you were – strike that.

Have you taken any steps to make sure that information provided by inmates in the SATP is kept confidential?

A. I think that is a specific provision of either the – well, the contract. I think it's either included in the specific language of the contract or in the RFP, which is an attachment to the contract, or incorporated [30] within the contract.

Q. You would agree, would you not, that that information is subject to subpoena by prosecutors?

A. Yes, I would agree with that.

Q. Did you take into account the – strike that.

Were you aware that inmates have expressed Fifth Amendment concerns about the SATP program?

A. I'm aware of that.

Q. Did you take that into account in the – in your approval of the SATP program?

A. We determined that that – we made the determination that that was a – not a valid objection on their part, and certainly nothing that would prevent us from proceeding with the program.

Q. And is it basically your view that this is not a punishment?

A. To make the statement or admit their participation in the – in the offense?

Q. Let me – would you – is it your position that the inmates being – the inmates who do not agree to enter into the program being [31] moved to maximum security, if they are in medium security, is it your position that that's not a punishment?

A. Yes.

Q. And why is that?

A. Well, moving from maximum – custody assignments within facilities are not relocations made for punishment reasons. There's no disciplinary process. A person has no right to be at a particular custody level. And from – moving one person from this custody level to this custody level as a housing assignment all within the context of the total operation of the corrections system is not a punishment. There's no -- there's no discipline imposed. There's no hearing process. There's no rule violation. And it's not recorded as a disciplinary report on their record.

Q. But wouldn't you agree that if the only reason for their being moved is the – because they do not want to admit to their crime, that that inmate is being punished for not admitting to the crime?

A. No, I would not agree with that.

[32] Q. Why not?

A. Again, I don't see housing assignments a form of punishment. I see it as a management responsibility or function that the corrections officials have in getting the

right people in the right places to participate in the programs.

You know, it makes no sense to have someone who's not participating in a program taking up a bed in a setting where someone else who may be willing to participate in a program could occupy that bed and participate in a program. Inmates don't get a choice of where to live. Those assignments are made by the corrections officials, and in doing that, we have to look at the overall management responsibilities and operations that we have in making sure the department runs as best it can.

Q. Isn't it true that the reason that the inmate's housing is – the inmate's participation in the SATP is tied to that inmate's housing situation is to encourage inmates to participate in that program?

A. It's an incentive, yes.

[33] Q. But why not just do it voluntarily? Why not just have this program be totally voluntary?

A. Well, I don't think we'd be fulfilling our responsibility that we have under the statute. You know, we're dealing with offenders who, you know, the information that we have available to us indicates that they have been convicted of a certain offense and that offense and their history involves certain characteristics. And in this particular case, sexual deviancy or sexual violations.

Our responsibility is to make as great an effort as we can, within the resources that we have available, to return that person to the community in a status where they're less likely to commit those offenses in the future. One way we can do that is to have the person participate in a

program designed to address the particular problem that they have. If we do not encourage that participation and allow the person to not participate in the program, then it seems to me that we've failed in that particular responsibility because the [34] person's sentence is served, that person's returned to the community, and the particular problem that resulted in the conviction has never been addressed.

Q. Wouldn't you agree that the first step to treating problems like a person engaging in sexual offenses is the person admitting voluntarily that they have a problem?

A. That's my understanding of the reason for that particular requirement in this program, the form that you showed me earlier.

Q. We talked about the Fifth Amendment earlier. You knew, as a lawyer, that prior to the SATP program being enacted, that you could not punish an inmate for exercising constitutional rights?

A. Yes.

Q. Are you aware of any inmate who has been moved from medium security to maximum security because of a refusal to participate in this program?

A. I believe there have been some. I can't give you any names of individuals, but I believe there have been some. How many, I don't know.

[35] MR. REBEIN: If I can just look through these, I think we're almost done.

MR. DOWELL: Okay. Why don't we step outside.

(Brief recess taken.)

Q. (By Mr. Rebein) I think we talked earlier about the fact that in your view, there was no Fifth Amendment concern here because the inmate had already been convicted of a crime. Is that correct?

A. That's correct.

Q. Are you aware that inmates are also asked to admit to other sexual offenses for which they may not have been convicted?

A. I think their entire sexual history is supposed to be part of this.

Q. So would you agree that – let me just repeat the question. Are you aware, then, that they are asked about other sexual offenses other than the one for which they've been convicted of?

A. It's my understanding that's part of the program.

Q. And is it also your understanding that if those other offenses involved children, child [36] abuse, that the persons in the SATP program to whom that information was given would be required, under law, to report that information to the Kansas authorities?

A. I don't know that for a fact.

Q. Are you familiar with the statutes which require healthcare providers and other professionals who learn about sex – who learn about abuse of children to report them?

A. I know that in general, those statutes exist. Who specifically they apply to, I do not know.

Q. Knowing that those statutes exist and that the inmate is required to give information about other offenses, don't you think that creates a Fifth Amendment concern, even if the inmate's already been convicted of a different offense?

A. Well, our view is that in the treatment context within the corrections system, that the Fifth Amendment would not preclude – those types of concerns would not preclude the type of program that we're operating for sex offenders.

[37] Q. Why not?

A. Because of the treatment context within which the program is offered in the correctional setting. I just don't see that as a Fifth Amendment issue.

Q. Even though the inmate could be prosecuted for those other offenses?

A. Yes.

MR. REBEIN: I don't have anything further.

CROSS-EXAMINATION

BY MR. MADDEN:

Q. Mr. Secretary, in the course of your deposition this afternoon, you've spoken in terms of moving – well, let me back up.

You were asked to examine Deposition Exhibit Number 21, which deals with the transfer of inmates from the medium facility to the maximum facility at the Lansing Correctional Complex. When discussing custody

levels in the context of that exhibit, are you discussing the classification, security classification of the facility or of the individual inmates?

A. Well, the medium – there are two [38] different – two different parts of that answer. There is a medium security facility, and then there are medium security inmates. A medium security inmate can live in a maximum security setting or they could live in a medium security setting. They could not live in a minimum security setting.

So there's a security designation for each living unit or each living area that's part of the system and then there are custody levels for each individual, and the restriction on the individual is that they cannot live in a security setting that is – that is lower than their custody classification level. So there are two different parts of that. One is the security level for the facility and one is the custody level for the inmate.

Q. As the Secretary of Corrections, do you have any reason to believe that a place – the placement of a medium custody inmate inside of the maximum security perimeter of the Lansing Correctional Facility subjects that medium custody inmate to an unconstitutional level of violence?

[39] MR. REBEIN: Object to the form of the question. Calls for a legal conclusion.

A. I don't have any reason to believe that that's the case. There are probably hundreds of medium security inmates today, and probably a good number of minimum security – or custody inmates, that are living in maximum

security settings today, and I don't think those inmates nor the maximum custody inmates are subjected to unconstitutional or unreasonably unsafe conditions.

Q. (By Mr. Madden) As Secretary of Corrections, do you have any reason to believe that the placement of a sex offender inside the maximum security perimeter of the Lansing Correctional Facility subjects that inmate to an unconstitutional level of confinement or undue risk of violence?

MR. REBEIN: Object to the form of the question as calling for a legal conclusion.

A. No, I don't.

MR. MADDEN: I have no further questions of the Secretary.

REDIRECT EXAMINATION

* * *

[41] was a pedophile, that that would create an unconstitutional risk of violence to that inmate?

A. I don't know that it would create an unconstitutional risk in each case. It may in certain cases expose that individual to a risk to their safety. That is not something that would be done within department practice. We certainly wouldn't authorize or condone that type of release to the inmate population. But whether it would create, in every instance, an exposure to unsafe conditions for that inmate, that would be strictly speculation and it would probably vary on a case-by-case basis.

Q. Would you agree that the Department of Corrections and the prison administration cannot control what another – an inmate does with his knowledge about another inmate's criminal offenses?

A. I would agree that we could not control that – an inmate's ability to tell other inmates what a specific inmate had done.

Q. So if an inmate learns about a person's offenses in group therapy, there would be no [42] way to stop that person from telling it to other inmates, true?

A. Other than removing that person from the setting, were we able to ascertain that that inmate was making that kind of disclosure.

Q. And if that happened to be a sexual offense such as a person being a pedophile, you would agree that that would create – could create a risk of increased violence to that – to the inmate?

A. I think the potential is there that it could.

MR. REBEIN: I don't have anything further.

MR. MADDEN: Nothing further. He would like to go ahead and read and sign.

MR. REBEIN: Okay. Great. (The witness was excused.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE,	)	
	)	
Plaintiff,	)	Case No. 95-3266-DES
	)	
-vs.-	)	
	)	
DAVID R. McKUNE, et al.,	)	
	)	
Defendants.	)	

VOLUME I
(Pages 1 through 55)

THE DEPOSITION OF BARBARA L. OWENS, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Friday, October 4, 1996, at the Lansing Correctional Facility, in the City of Lansing, in the County of Leavenworth and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the

District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[23] A Many persons with sexual offending behavior will deny their behavior.

Q To have the most effective treatment, the therapist needs to break through that participant's denial, isn't that correct?

A No.

Q So a person could be effectively treated and continue to deny his sexual deviancy or offenses? Is that what you're saying?

A No.

Q Could you clarify your position for me?

A The treatment process is 18 months long. It is important that the person with the sexual offending behavior take responsibility for that behavior. There are certain criteria that need to be met during that treatment process for effective treatment.

Q What do you mean when you say a participant needs to take responsibility?

A A person with sexual offending behavior needs to take responsibility for that sexual offending behavior and be accountable for those offensive behaviors.

Q Part of the program here at Lansing Correctional Facility requires the [24] participant to fill out an official admission of responsibility or admission of guilt form, right?

A It's called a statement of responsibility.

Q Statement of responsibility. Were you involved with drafting that particular document?

A I was involved with drafting the statement of responsibility document.

Q You were?

A Yes.

Q Is it possible to have a program of effective therapeutic treatment for sexual offenders without a written record of responsibility? Can you have a person accept responsibility verbally, without writing it down and keeping it as a record?

A Would it be possible? Is that what you're asking me?

Q Yes.

A Yes.

Q Was there ever a decision-making process as, "We need an actual form that needs to be written down"? Did, at one point, you say – let me stop and ask: Are you aware of some

* * *

[62] Q So no attorney reviewed that, a prison attorney or someone at DCCCA?

A It's possible that an attorney could have looked over this at some point because the forms have gone out to different attorneys. No attorney was inovlved in the planning of this.

Q You mentioned some federal and state laws. Can you state specifically which federal and state laws those are?

A I don't know the numbers of the statutes.

Q Okay.

A But by law, there are certain things that we are required to report.

Q Okay. Could you delineate what those certain things are?

A Mandatory reporting of child abuse is required by law.

Q Is that both –

A Social workers –

Q Is that both state and federal?

A I don't know. I know – yes, I believe so. Court-related – ordered release of records, I don't know if that's a statute. Information needed to protect a third party, I believe that is a law. There was a Supreme Court case on it, I know.

[63] And escape planning and inappropriate relationship – relations with staff, I do not believe those are laws, but it's according to KDOC policy. Harming themselves or others would be related to information needed to protect a third party. I believe that's by law.

Q Do you have somewhere a file of the statutes on confidentiality and disclosure and reporting requirements for therapists and social workers?

A Yes, I do.

Q And that would have the actual federal laws you're talking about and the state laws?

A I believe so.

Q Is there a state law that requires – that makes it a misdemeanor if you fail to report a case of child abuse that you learn of as a social worker or psychotherapist In Kansas?

A I don't know if it's a misdemeanor, but people are required to report.

Q But I'm asking is there a state law that says if you as a social worker or psychotherapist or psychologist learn of an instance of child abuse and you don't report it, that you can be held to some form of criminal penalty or criminal charge, be it a misdemeanor or felony or something?

[64] A I don't know about that. I know I could lose my license.

Q Okay. Now, you stated at the preliminary injunction hearing that all of your SATP files are subject to subpoena.

A Yes.

Q Do you recall saying that?

A (Nods head yes.)

Q Could you tell me what you meant by that, what that – what you mean subject to subpoena? What's your understanding?

A That the SATP files, if we were under court order or if they were subpoenaed, we would be required to turn them over.

Q Okay. And you'd have to obey that subpoena?

A It's my understanding.

Q Okay. Have any of your files in the SATP since you've been in charge of it been subpoenaed?

A No.

Q Have any files in the SOTP before been subpoenaed?

A Not that I'm aware of. Not that I was aware of.

Q Have you ever heard of an instance where files of a therapist have been subpoenaed for information about –

A Yes.

[65] Q Can you give me an example?

A I need to correct that. I believe there was one instance since I have been back that the Court – we did have a court order to have – that the attorney did come up and review the files, and that was a subpoena, court order.

Q Do you know when that was?

A I'm going to say a year or so ago.

Q Was that a case somewhere in Kansas?

A Yes. I believe it was a sexual predator hearing.

Q Did that involve Nancy Orrick, by chance, as the attorney?

A Yes.

Q And she went to court and got a subpoena to look at those documents?

A I believe so.

Q And the file that they're allowed to look at, that would include the therapist's report of the inmate who's involved with the SATP?

A Yes.

Q It would involve their sexual history form that they filled out?

A At that time, I don't know if that particular case had a sexual history in it because the program has changed, and I do not know when that – what [66] program that person was under.

Q Okay. In general, though, an inmate's file who's involved in the SATP, their sexual history form would be in there?

A It could be, yes.

Q Okay. Is it likely that it would be?

A Yes.

Q An analysis or interpretation of the plethysmography results would be in there?

A It could be, yes.

Q Their analysis, interpretation of their polygraph?

A It could be.

Q Is it possible that you would have the videotape of their group discussions in their file?

A No.

Q Why is that?

A The videotapes are viewed by either the program consultant or the Psy.D. psychologist or myself. The feedback on those tapes are given to the therapist. Sometimes they are shared with the group and the tape is erased. The only – in all likelihood, if it was mentioned in the progress notes, it would just be the group was videotaped, feedback shared with the group.

Q So does a group – is it possible that a group

* * *

[69] members. That has been – that has been the case.

MR. DOWELL: Off the record just a second.

(Discussion off the record.)

Q (By Mr. Byrd) Part of the limits of confidentiality form that's marked as Deposition Exhibit 7 states that you cannot guarantee inmates will keep – other inmates involved in the program will keep things confidential, correct?

A Correct.

Q And if an inmate releases confidential information, they're kicked out of the program, is that correct?

A At times, yes.

Q That's not an across-the-board policy?

A Yes, it is.

Q Have there been inmates who have released confidential information but have not been kicked out of the program, without naming any names?

A There have been some that have been accused of breaking confidentiality that have not been kicked out or terminated from the program as there was conflicting information given from other inmates.

Q Has any inmate been kicked out of the program for release of confidential information?

A Yes.

[70] Q How many inmates have been kicked out, can you estimate?

A I would – in the last two years?

Q Sure.

A Approximately maybe three.

Q Do you know who they would have released that confidential information to? Is it to other inmates? Is it to spouses?

A It's my understanding other inmates.

Q No. 4 on Exhibit 7 states that the confidentiality of the program is not limited to information – quote, information needed to protect participants from harming themselves or others, closed quote. What does that mean?

Could you provide some – that's No. 4. Particularly what I'm interested in there is the "others." Who else would need to be protected?

A Could be other Inmates.

Q Could it be other citizens out in –

A It could be staff. It could be if there was a specific person we felt needed to be protected. Those would be the instances.

Q Who's the one who makes the ultimate decision on whether information is kept confidential in this program? Is that your decision to make?

* * *

[84] videotaped. After that, most of them feel more comfortable, and that has never been their stance throughout the whole program.

I do not know what would happen if it was their stance throughout the whole program because we have not had to deal with that.

Q So no one's revoked videotape consent that you're aware of?

A That I'm aware of, since I've been back, no.

Q What are some of the reasons why they don't want to be videotaped?

A Some of the reasons that I have been told, they wonder where it's going to be. Some people do not feel comfortable being in front of a camera. There have been those that have said they have an aversion to cameras, are very paranoid around that.

Q Has anyone ever stated that they don't want to be videotaped because they don't want to have a record of what they say on videotape?

A That could be the case, yes.

Q Have you heard of any instances where that's – that someone has raised that?

A Not to me, no.

Q We were talking about – or you mentioned – actually, I mentioned inmates fill out sexual [85] history forms. Is that something they do at the beginning of their program, their involvement with the program?

A Generally, it's started in the first three months of the program.

Q And it's something – is it something they're required to do?

A It's something that's part of the treatment program.

Q Okay. If an inmate was involved in the program and said I don't want to fill this form out, what would you tell that inmate?

A I would expect that form to be filled out at some point during the program.

Q Okay.

A Generally, there may be resistance to some of that in the beginning of the program. We expect that in a lot of cases. As the program progresses and that participant progresses, there have not – there has not been anyone that has refused to do that.

Q At some point, though, before they complete the program, the 18-month program, it's fair to say that they're required to fill out –

A Yes.

Q – the sexual history form?

[86] A Yes

Q They can't complete the program without filling it out at some point, is that correct?

A That would be correct, accurate.

MR. BYRD: I'm going to mark this as Exhibit 9.

(EXHIBIT NO. 9 WAS
MARKED FOR IDENTIFICATION.)

MR. BYRD: This as Exhibit 10.

(EXHIBIT NO. 10 WAS
MARKED FOR IDENTIFICATION.)

Q (By Mr. Byrd) Miss Owens, I'm going to give you Exhibit 9, ask you if you recognize that document.

A This is – this is an – it says an abbreviated sexual history form that is used for SATP.

Q Is it currently being used in your program?

A I don't know that each person uses this exact form. I believe this form was started with the use of the polygraph testing. I don't know that the – each facilitator goes by this. This is what this was used for at that time, was for self-disclosure during a polygraph testing program, part of the program.

Q Does it say somewhere on this document that this is involved with the polygraph?

A I don't know. I would have to read through all of it to say if it was for the polygraph only.

* * *

[89] Q Tell me how many files we're talking about here. You have a separate treatment file, is that correct?

A Yes. We have – there's two different files. We have the treatment file and then there is a separate file kept on their physiological testing, two different files.

Q And the physiological testing, that indicates the plethysmography and polygraph?

A Yes.

Q Anything else?

A No.

Q Mike Parsons you stated put this together, is that correct?

A I believe he was the one that began the draft on that based on other forms that he had received in his training for polygraph and plethysmograph testing.

Q Did you review it?

A Yes. We all reviewed it, the treatment team, people in the program.

Q This sexual history form, this pertains to incidences besides those for which you were convicted of sexual – what does sexual history mean? Why don't we do that?

[90] A in relation to this form, this would be the offense that they are charged with.

Q Only the offense they're charged with?

A That's what it could be, yes. Sexual history form as far as what many of the therapists use during the treatment process is a time line of their sexual experiences throughout their life.

Q Okay. Where on this form does it state that this applies only to their conviction?

A Says offending behavior. Basically, when we talk about offending behavior, it's in relation to that, their conviction, in relation to the testing.

Q Outside of the offending behavior headline here on this form, where else on this form does it state that this only applies to the conviction which you were charged with?

A It doesn't.

Q Will you read that first paragraph right there of the form?

A Yes. "Part I of your sexual history refers to the number of victims you have molested or otherwise offended against. You must think back to anyone or any situation that involved a lack of consent. Remember, this section applies to those sexual activities where you were the perpetrator and a [91] victim was involved.

"Each victim must be discussed separately. Answer these questions for the first victim and then start over on a new page for each additional victim. If you have any questions, refer back to the instruction sheet and/or ask for clarification. If you need more paper, let us know."

Q The paragraph states, " . . . this section applies to those sexual activities where you were the perpetrator and a victim was involved." Based on that language, that could apply to other situations for which you were not convicted – for which the inmate was not convicted?

A That's correct.

Q And this document states, " . . . your sexual history refers to the number of victims you have molested or otherwise offended against." That can include people, victims which you were not convicted of?

A That's correct.

Q This document, an inmate filling it out who's been involved in your program, he could include other victims that he molested, offended against or raped that have nothing to do with his conviction?

A That's correct.

[92] Q And he's required based on the language of this program or this document to include other sheets of paper, if necessary, to list all of those people he's molested, offended against or raped, is that correct?

A You say he's required to?

Q Well, based on the language of this document. I think the language says, "If you need more paper, let us know. Answer these questions for the first victim and then start over on a new page for each additional victim."

Does that mean that if you have other victims, even those which you haven't been convicted of, that you need to fill out this information on other sheets of paper?

A It means they could, yes.

Q Okay. That document – or excuse me. Exhibit 10, let me see if you're familiar with that program – that document, and tell me what it is if you are familiar with it.

A It says Sexual Abuse Treatment Program, Abbreviated Sexual History Form. I believe this is a form that Mike Parsons uses in a physiological testing component.

Q Is that a form that's currently being used in

* * *

[99] sexual histories, that would have to be reported, and that would be reported.

Q What about if they include having sexual relations with another inmate? Is that something that you would report?

A Be something that would in all likelihood be dealt with in group first or individually with that inmate.

Q But would it be something that eventually would get reported at some point?

A I don't know.

Q Would you report it if there was evidence in someone's sexual history that they were having an ongoing relationship with another inmate sexually?

A Are you talking consensual or non-consensual?

Q I'm thinking of a situation where an inmate is being raped against his will.

A That would be reported.

Q Who would you report that to?

A I would report that to KDOC.

Q What other purposes are the sexual history forms used for? Are they used in group therapy at all?

A There are those times when a participant will share their sex – will share their sexual history with the group. That can be very important to the [100] treatment process. There are those that are very committed and motivated in order to do what they need to do in order to never reoffend and be safe in the community.

They are generally the ones that will do whatever they can to be aware of their cycle, to be aware of how – how their sexual history had a part in them getting to prison.

Q Is this sexual history form – is it something that would be shown to other participants in the program, other inmates?

A No.

Q Never, not even during group therapy?

A Not unless that inmate so chose to do that.

Q Would information on the sexual history form – would that be used by Mike Parsons to formulate questions?

A That could be used by Mike, yes.

Q For both the polygraph and/or the plethysmograph?

A In the plethysmograph, usually, there are no questions asked.

Q I want to mark as exhibit –

MR. BYRD: Exhibit 11.

(EXHIBIT NO. 11 WAS MARRED FOR IDENTIFICATION.)

Q (By Mr. Byrd) Miss Owens, have you – I want you

* * *

[108] about those. I think you referred to in a previous deposition that inmates are required to fill out a form accepting responsibility.

A A statement of responsibility, yes, or admission of responsibility.

Q Is there a difference between an admission of responsibility and an admission of guilt?

A Just in terms.

Q Just –

A My understanding is guilt is a legal term. Responsibility is not.

(EXHIBIT NO. 12 WAS MARKED FOR IDENTIFICATION.)

Q (By Mr. Byrd) Miss Owens, I ask you if you recognize that and if you can tell me what that is.

A Yes. Says SATP Admission of Guilt. This was the form that was first used before we changed it to admission of responsibility.

Q So that's no longer being used in the program?

A No, this is no longer in use.

Q Was that used when you first started here?

A Yes.

Q When was it charged?

A I do not remember exactly when it was changed.

Q Was it changed this year, in 1996?

A Yes, I would believe so.

[109] Q Changed in the summer or spring?

A I think it was probably changed in the spring. I don't exactly remember when, it was changed.

Q Were you involved with the decision in having it changed?

A Yes.

Q Who else was involved with that decision?

A Michael Woods.

Q Who is he?

A He's the coordinator of the SATP program in the Hutchinson Correctional Facility.

Q So he's your equivalent there?

A Yes.

Q Was anyone else involved?

A We talked it over with my bosses at DCCCA. We talked it over with the DCCCA attorney.

Q Who is that DCCCA attorney?

A John Knox.

Q Okay. I don't know if I've seen that actual document, admission of responsibility.

MR. DOWELL: We can go off the record.

(Discussion off the record.)

Q (By Mr. Byrd) Will you look at both Exhibit 4 and Exhibit 12 and explain to me the difference between the two?

[110] A There's a difference in wording. Exhibit 12 says admission of guilt. Exhibit 4 says admission of responsibility. There's also a difference in the wording on the forms.

Q Uh-hum.

A They both require a signature of the participant and the date and a witness, which is – and a date, which the witness is generally the person that does the orientation to the program or the participant's facilitator.

Q Outside the change in the word from admission of guilt to admission of responsibility, substantively, is there anything that you can tell different between. the two forms?

A Uh-hum. In the admission of responsibility, there's also a statement on there that says, "I realize SATP is on my IPP and is a voluntary program."

Q And that's not on the admission of guilt form?

A No. And there's a difference in wording that says, "This document will serve as my official admission of

responsibility and my need for treatment" on Exhibit 4. My need for treatment is on – is not on Exhibit 12.

Q And if I could summarize, the difference between [111] the two forms besides the words responsibility and guilt is that the admission of responsibility form includes a statement that this is a voluntary program and the second other difference is that this is a – the admission of responsibility form states that this is the official admission of responsibility form and need for treatment? Those are the differences that you see?

A Yes.

Q Okay. So before the admission of responsibility form was used this year, would the same information be included on both forms?

A Basically, yes.

Q Okay. I found Exhibit 11. I think that's what we were getting into before we took a break. Page 2 of the exhibit, No. 1 states, "I agree to voluntarily take a plethysmograph examination, having had the procedure explained to me by the examiner."

Outside of medical reasons, if they had reasons such as – any other reasons, can they refuse to take – I mean, they're required to take the plethysmograpy?

A It's a, yes, program criteria. There have been those that have – refused may be too strong a

* * *

[114] mean by that? Could you explain that?

A There are criteria for each phase of the program – the first three months of the program, the next twelve months of the program and then the final three months. If that person is not meeting that criteria, they are not seen to be progressing through treatment.

Q So can you give me an example of someone who has been terminated from the program for failing to progress without naming any names?

A There have been those occasions when someone was terminated from the program for failure to progress in treatment. They were not involved in the treatment process, would not do the treatment involved, would not work on their – on their deviant sexual cycle, did not express or would not do anything in relation to having empathy for the victim.

There are those that perhaps would not do anything as far as a relapse prevention plan, that were very resistant to doing any of the work that is seen as lack of progress.

Q Would lack of progress include someone who steadfastly adhered to their innocence of the actual crime of which they're convicted?

[115] A That would be continued denial of the offense. Yes, that would be.

Q And you could be terminated from the program for that?

A Yes.

Q Oh, that's No. 3, continued denial of offense.

A Yes.

Q Okay. Would refusal to fill out a sexual history – would that be something that would be taken into account for failing to progress in treatment?

A Could be, yes.

Q Can you refuse to take a polygraph test?

A You could refuse. A continual – a continual refusal would be real similar to on the PPG. Someone could come in and say I don't want to be tested today. That person, in all likelihood, would be given another chance, would set up an appointment to be polygraphed, and that would not be read as a refusal to be tested.

Q For example, in Deposition Exhibit 11, on the plethysmograph examination protocol, No. 4 states that I also understand that this may be grounds for termination from the program if they refuse. Isn't that what No. 4 states?

A Yes, it does.

[116] Q So refusal from the program can be grounds for terminating someone from the – or refusal to take the plethysmography can be grounds for termination from the program?

A Could be, yes.

Q Same way with the polygraph, is that correct?

A Could be, yes.

Q You have them fill out a form when they're terminated from the program?

A If possible, yes.

(EXHIBIT NOS. 14 AND 15 WERE MARKED FOR IDENTIFICATION.)

Q (By Mr. Byrd) Miss Owens, I'm handing you Exhibits 14 and 15. First, do you recognize those?

A Exhibit 14 is our Sexual Abuse Treatment Program Dismissal Prior to Completion. This is the form that is used when someone is dismissed or terminated from SATP.

Q Is that currently being used now?

A Yes.

Q Okay. And Exhibit 15?

A This is marked Sexual Abuse Treatment Program Termination Prior to Completion, Exhibit 15.

Q Is that currently being used in the program?

A Yes.

[117] Q How are those two different, if they are?

A Exhibit 14 is the one that we use basically when the person is dismissed by the program. Exhibit 15 is one where a person chooses to self-terminate or dismiss themselves from the program.

Q And these are forms that you have them fill out when they – when they terminate from the program?

A Yes.

Q On Exhibit 15, I'm going to ask you to explain something. "Although my failure to follow the advice I

received may affect my parole eligibility status, I nevertheless choose to terminate my commitment to this program. I assume the risks and consequences involved with this decision."

First of all, who drew up these programs – these documents, Exhibit 15 and 14?

A I believe these have been in use throughout the history of the program. I don't know exactly who would have drawn them up. Could have been Michael Woods and myself. This one's marked 9-1-91. I don't – Exhibit 14 is marked at that date. I do not know who all went in to drafting the documents.

Q Okay.

MR. BYRD: Let's mark this as Exhibit 16. (EXHIBIT NO. 16 WAS MARKED FOR IDENTIFICATION.)

Q [118] (By Mr. Byrd) Are you familiar with that document, Miss Owens?

A Yes. Exhibit 16 is an SATP refusal to submit to treatment form.

Q How are these three, 14, 15 and 16 – how are they different, or are they essentially the same?

A No. Exhibit 16 is a refusal to submit to treatment and refusal to enter the program. Exhibit 14 is when a participant is dismissed or terminated from SATP by the program after he is in the program, and Exhibit 15 is when the participant chooses to terminate himself from the program.

Q Okay. In Exhibit 15, there's a reference to assuming the risks and consequences involved in the decision. What does that mean? What's that a reference to, in your understanding?

A In my understanding, it is a reference to if someone – that there could be consequences to them dismissing themselves from the program.

Q What are some of those risks and consequences?

A They could lose good time. They could not be looked upon favorably by someone not doing the program.

Q By? Who would look unfavorably upon them?

A I don't know who.

Q [119] Would the Kansas Parole Board?

A That's a possibility, yes. There could be a loss of level. There could be consequences.

Q Okay. Why not make the program, the SATP program, mandatory?

A That would not be SATP's decision. It's my understanding that would be a decision that would be made at the Department of Corrections level.

Q Okay. If they came to you and asked for your input, why would you choose to make a program voluntary over mandatory given your – they come to you, given your experience with dealing with sexual offenders and your educational background and your career development of dealing with people like this, and they asked you, "We need to decide whether to make it voluntary or

mandatory. What's your thoughts?" What would you tell them?

A I would tell them that I think every sex offender needs treatment of some sort, but also tell them that not all sex offenders are appropriate for treatment; that I would prefer that the SATP program now that is in place remain voluntary, but I think some sort of treatment for all sex offenders should be mandatory, whether that be through mental health or through another program,

* * *

[124] Q I may have asked you this once before, but I just wanted to make sure. When I was asking you questions about the inmates' files in the SATP when they're subpoenaed, have they ever been subpoenaed, do you know, to your knowledge, down at Hutchinson by anyone?

MR. DOWELL: I'm going to object to the – which files? Maybe clarify that.

MR. BYRD: Oh. I'm talking about the treatment files involved in the SATP.

THE WITNESS: I don't – I don't know about those at Hutchinson.

Q (By Mr. Byrd) Do you –

A I would not be the one to answer that question.

Q I'd have to ask the person at Hutchinson?

A Yes, because I don't know.

Q On the polygraph, it's possible, is it not, that an inmate could be asked questions about other incidences

of sexual offenses other than those for which they were convicted?

A That could happen, yes.

Q What's the name of the person down at Hutchinson?

A Michael Woods?

Q Who's your equivalent?

A Yes.

* * *

[126] A For a brief period of time, yes.

Q Do you know where he is now?

A Yes. Tom is employed by Bert Nash Mental Health Agency.

Q Is that in Wichita?

A No. That's in Lawrence.

Q Without naming any names, if possible, have you ever been confronted with a situation where inmates have complained about receiving different interpretations of their plethysmograph results?

A Have I been involved in that?

Q Have you ever heard of that happening as part of the SATP program here at Lansing?

A Yes.

Q Has that happened frequently?

A No.

Q Can you give me some background to those circumstances?

A As I remember it, there was some concern at one time at receiving somewhat different interpretations of a PPG.

Q Are you suggesting that that's only happened once?

A Yes.

Q So, as far as you know, there's only been one instance of an inmate complaint?

[127] A Yes.

Q For terms of defining what a sexual offender is, how do you define what a sexual offender is? Do you simply go by whether they've committed a criminal act or charged criminally, let me put it that way?

A You're talking about a sexual offender within the Department of Corrections?

Q Yes.

A Well, I define a sexual offender as a person who has a sexual offending behavior against a child or adult.

Q What's your definition of a child, for example? Do you have an age restriction? Let me ask you this: If a 25-year-old man had sex with a 17-year-old woman and it was consensual, would that man have committed a sexual offense that would need treatment, in your experience, in your background, in your training?

A Are you saying it was consensual sex?

Q Uh-hum.

A I don't know what the exact age as far as when a female – I believe it's 16. I'm not sure.

Q That's my understanding.

A Sixteen?

* * *

[130] Q Were you involved with the sexual offender treatment program, the SOTP?

A Yes. I was a therapist for two years under Weldy Associates.

Q When did it become the SATP? Is that when it started under DCCCA?

A No. DCCCA had the contract with SOTP, I want to say, from July of '91 through October of '94. At that time, it was still SOTP. I was involved for – I worked for DCCCA for a year at that time and then left.

Q Do you know, through your involvement with the SOTP and as a therapist, if a person refused to enter into the treatment program, were they moved to maximum security or was that a possible consequence, do you know?

A You're talking like in 1991?

Q Uh-hum, back under the SOTP.

A I don't know. I don't remember.

Q Who is Mike Parsons' supervisor for – you're his supervisor on the whole, right?

A Yes.

Q Who supervises him in his analysis and interpretation of plethysmography results, or is he the –

[131] A Mike consults with other plethysmographers and polygraphers if he needs to.

Q Do you know –

A He consults with Dr. Robert Card on plethysmography. On the polygraphy, I believe he consults at times with Gary Davis and with some people in Oregon where he went to his training.

Q But he has no one here in the program who you would say supervises him in his interpretation and analysis of the program?

A No.

Q I don't think I have any other questions. That wraps it up.

A Thanks.

Q Sure.

MR. DOWELL: She'll want to read and sign.

(Witness excused.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE,

Plaintiff,

Case No. 95-3266-DES

-vs.-

DAVID R. McKUNE, et al.

Defendant.

VOLUME I
(Pages 1 through 208)

THE DEPOSITION OF MICHAEL J. PARSONS, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Friday, October 4, 1996, at the Lansing Correctional Facility, in the City of Lansing, in the County of Leavenworth and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[122] them during the time they're in our unit for a regular program, I will go down to the education room at the beginning of the day and just call that particular inmate out and we will go down to my office for the assessment.

Q While we're on the subject, let's – are there any countermeasures that you have witnessed an inmate take to try to alter the results of the plethysmograph?

A That I've witnessed? No.

Q That – have you ever had concerns about a particular inmate altering the results of the plethysmograph?

A Yes.

Q Tell me the types of things that you were concerned about.

A Excessive masturbation prior to. Masturbation during. Use of drugs or alcohol prior to. Actual touching of the gauge. Touching of themselves. Failing to self-report to the appropriate places during the assessment. Failing to report accurate information on what they had just been administered through – audio tape-wise [123] through the head set. Several of these are on participant verification, that they reported that these things were things they did. Not listening to the tape. Negative self-thoughts. There's mumbling, talking to their penis, singing songs. There's several occasions. Counting backwards.

Q Anything else?

A That would be a beginning list I can recall right now.

– Q Let's go through it quickly. Would you agree that if an inmate masturbates just prior to the exam, that that has an effect on the plethysmograph exam?

A It could.

Q Would you agree that that would affect the reliability of the – of your interpretation of the exam?

A It would be dependent on an individual case, but it could.

Q Okay. What about you said that some inmates try to do it during the exam?

A Uh-huh. Yes.

Q Is that where somebody is not excited by a particular sequence but is trying to get [124] excited by it?

A Yes.

Q Has that occurred during your administration of an exam?

A I've not had a verification where the inmate has said, "Yes, that's what I was doing." I've had verification saying, "Yes, I was trying to enhance a response or to create a response."

Q In those occasions, were you suspicious that it had occurred?

A Yes.

Q Are they videotaped?

A No.

Q Why not?

A Privacy.

Q Can you see them through the window?

A No.

Q For privacy reasons?

A Yes.

Q Would you agree that masturbation during the exam affects its – would affect the reliability of the results from the exam?

A I wouldn't agree on the reliability. I would look at that as a countermeasure which would [125] question – whether I would look at it – how valid it would be, how true the responses were.

Q Okay. I think you've separated out reliability. Can we call that validity of the exam? Of – not of the exam, of the results of the exam.

MR. DOWELL: Can we –

MR. REBEIN: Yeah. Let's take a break.

(Brief recess taken.)

Q (By Mr. Rebein) Can we – I want to get the right terminology. Can we agree that masturbation prior to the exam and during the exam affects the validity of the test results?

A It would affect the results of the test results.

Q But would you not agree that it would affect the validity of the test results?

A Yes, I would agree that it would affect the validity of the test results.

Q What about use of drugs? First of all, explain to me how use of drugs can affect – have an effect on an exam.

[126] A Depending whether a person's under the influence or not can be a determinant on what type of response is made or –

Q Have you read any studies that indicate that somebody who was intoxicated on alcohol would not – might not respond to certain stimulus the way someone who wasn't intoxicated would?

A No.

Q What's the concern with drugs?

A The – the protocol that we follow in recommendations I've read is we don't test someone who may appear to be under the influence of drug or alcohol.

Q Do you do a drug or alcohol test just prior to the exam, to make that determination?

A No.

Q Why – what's your understanding of why you wouldn't want to do an exam on someone who was under the influence of drugs or alcohol?

A My role in that would be part of the program is based on their honesty and how honest they're being with themselves and with us in treatment, and I would take their word for that. The other thing is, I don't have the [127] facility to do a drug screening test in my office before each exam.

Q I think you've misunderstood my question. What would you be concerned about as far as giving an exam to somebody who's under the influence of drugs or alcohol?

A That would depend on what they may be under the influence of.

Q Say alcohol.

A I – I still couldn't answer that because I'm not sure how that participant would respond under the effects of alcohol.

Q I understand that. I'm just asking you what – what you understand the concern to be about people who are under the influence engaging in the test.

A Okay. I would be unable to answer that because I would not administer a test to someone who appeared to be under the influence of alcohol.

Q Okay. Have you read the literature about – any literature about whether or not drugs or alcohol can affect the validity of the test results?

A No, I have – I cannot say I've read any [128] literature around that. The literature I've read is, they recommend not testing or administering the test.

Q But you don't understand why they make that recommendation?

A Due to the possible effects it may have on the assessment if they're under the influence.

Q But you don't know what those effects are?

A Not particularly.

Q Well, do you or don't you?

A Not particularly. Depending on the drug. If it was a depressant, would it cause a low arousal? If it was something, would it enhance the arousal?

Q Right.

A Would it –

Q I'm trying to get from you your understanding of what –

A Uh-huh.

Q – effects these drugs can have.

A It would depend on the drug.

Q Okay. Alcohol?

A I would be unsure of that, depending – without knowing that person. I cannot answer [129] that question without knowing the individual.

Q Okay. Depressants?

A Same thing.

Q Marijuana?

A Same thing.

Q Cocaine?

A Same thing.

Q Is there any drug that you would know what the effect would be?

A Not directly because I'm not sure how that chemical would mix with that individual and how that person would respond to it.

Q What about you said touching the gauge?

A Uh-huh.

Q Would you agree that touching the gauge could affect the validity of the test results?

A I would say it would alter the test results.

Q Well, if it alters it, doesn't that affect the validity?

A It could on that particular stimulus.

Q So can we agree that touching the gauge affects the validity – could affect the validity of the test results?

A Of certain parts of the test results.

[130] Q So let me ask it again. Can we agree that touching the gauge can affect the validity of certain parts of the test results?

A Yes.

Q What about – can't read my own writing I have touching of themselves. I guess that's what I've written down. Have you – would that fall within the category of masturbation during the exam?

A No.

Q Okay. Explain to me the difference.

A We've had participants report that they've squeezed themselves during an arousal in order to lower that arousal. It would more closely fall into the touching

of the gauge, where they would squeeze the gauge shut. In that case, they would squeeze their penis and the gauge shut at the same time. Or they would pull on their penis, therefore trying to stretch it out to make it longer.

Q Would you agree that touching of themselves in the fashion you just described could affect the validity of the test results?

A If they – certain parts of the test, yes.

Q Okay. And let's be clear. When I say [131] "affect the validity of the test results," I am – what I mean is affect the validity of any part of the test results.

A Okay. If any part of it, yes, it would.

Q Back to the drugs, do you know whether insulin – or what the concern is about testing someone who's on insulin?

A I'm not a medical doctor, but we have all the men screened medically by a medical doctor who works – or is contracted by our organization, and she determines whether medically they will be tested or not. I have no –

Q I understand that. But do you know whether there's a concern about testing an inmate who has – is on insulin?

A If they are noted with diabetes, I will take that – and they were using insulin for that reason or for other reasons, I would take that into consideration.

Q All right. My question is: But do you know why that you would – well, would you give a test to an inmate who was on insulin?

A If they were medically cleared.

Q Have you read in any of the literature

* * *

[138] Q Did that individual go ahead and start self-reporting?

A For the most – I've never had an individual go through the entire assessment without self-reporting.

Q You mentioned failure to report accurate information. Tell me what's happening when somebody does that.

A At random, I will talk to the individual over the headset. We communicate over a headset. And I'll ask them to describe what they just listened to, and if they are not even close to what they've just listened to, I take that as inaccurate self-reporting of the information. For example, if they listen to female infant and they tell me they just listened to a 14-year-old boy, there's obviously something going on that they didn't hear the – or weren't listening to the –

Q I think the two things we've just talked about – and correct me if I'm wrong or tell me if I'm correct, I guess is a better question – the two things we've just talked about have to do with making sure that an inmate is concentrating on the audio tape and [139] not blocking it out and trying to think about something else?

A Those are two – yes, those would be two areas that we use to ensure, as much as possible, that they are paying attention to the assessment.

Q Is there a term you would use for someone who is trying not to pay attention to the audio tape?

A There – there wouldn't be a term. It would be determined on everything that's going on.

Q Okay. Would you say that person is blocking it out or is there some other term that you'd use?

A They may just not be paying attention. They may be uncooperative. They may not be willing to take the assessment at that time.

Q Let me ask you whether you would agree that someone blocking out the audio tape and not paying attention to it could affect the validity of the test results.

A Could affect, yes, certain parts of the test results.

Q You talked about negative self-thoughts.

A Uh-huh.

[140] Q Is that where someone would associate an image that might arouse them with something that repulsed them?

A It could be. It would be dependent on the individual, once again.

Q Would that be – would someone do that, what I've just described, in order to keep from getting an erection on a particular segment that was arousing?

A I have had individuals state that they thought of negative things when they knew an arousal was becoming apparent.

Q If someone engaged in negative self-thoughts, as we've just described them, would that – that could affect the validity of the test results, correct?

A It could.

Q You mentioned that you've witnessed people talking to their penis?

A I have – I guess through the headset, I've witnessed them talking to their penis.

Q What's going on there?

A "Go away." "What are you doing, you son-of-a-bitch?" "Go down." "how come you're standing up again?" "This doesn't [141] look good." They have made several comments talking to their penis over and over again.

Q Does – what's – what is your understanding of why they would do that?

A I wouldn't be able to answer that unless they think that by doing that, it would make them more aware that they maybe should not be getting aroused to a certain tape that they're listening to. I can't answer why they talk – talk to their penises.

Q Would you agree that if someone was able to talk to their penis successfully, that that could affect the validity of the test results?

MR. DOWELL: I'm going to object to the form of the question. You haven't defined what successful speaking to the penis is.

Q (By Mr. Rebein) If somebody was able to use that method to keep from getting aroused on a particular portion of the tape that was arousing them, I want you to assume that they could – would you agree with me that that affects – would affect the validity of the test results?

* * *

[149] Q Is it less than half?

A It – it would depend if it was – if it was needed or not. There has never been a time that I have not recalibrated when I needed to recalibrate. If I have a – what I would say a flaw-free assessment or a good assessment with no changes, then I wouldn't – there's no need to recalibrate.

Q But you don't know how many – you wouldn't be able to tell me how many times?

A Not – not sitting right here today. I'd have to go back and look at each individual.

Q Back to our progression through this procedure, I think we've talked about calibration and we may have missed a step. We talked about the procedures for bringing somebody in, correct?

A Correct.

Q And the calibration. Is there a step in between those two where you give more information?

A Yeah. When – when the participant comes into the office is when we begin going over this packet here.

Q Exhibit Number 2?

[150] A Exhibit 2, yes. And we begin going over the first three sheets or – three sheets of that packet. At that time is when, once again, they're offered plenty of opportunity to discuss any concerns, any questions. They are shown the lab at that time, where they're going to sit. They're shown the rest room, those three forms, the disinfecting process. We cover that on what's going to happen with the gauge. They have opportunity to either accept the disinfecting process or request a witness that the gauge be disinfected right there in front of them.

I'm trying to think of other things that happen in that time frame. At that time they're also instructed how to measure. They are then taken in the lab, like I said, and shown the actual area. Then they go back in and measure, and this is all done before the actual calibration takes place. They are – this is the time also that – with the consent form and the protocol, if they do not sign those, then I cannot test them and they are just released from – from the office and I report that to the clinical team.

[151] Q Is there anything else that happens before the test itself that we haven't talked about? Any other step in the process?

A Before the actual assessment?

Q Yes.

A After I take – after I calibrate the gauge, then the gauge is taken in to the participant. He's instructed where his pants need to be, where to place the gauge, how to place the gauge. The galvanic skin response sensors are placed on the fingertips.

Q Let's stop there. What do those do?

A The galvanic skin response sensors do various things. They sometimes show arousal, similar arousal patterns to what we see on the gauge that is connected to the penis. They indicate, at times, when someone is trying to suppress a reaction. They also indicate possibly when someone is trying to enhance a reaction. If someone takes that hand and is masturbating with it, I definitely can tell by those movements.

Q What does that skin response test, though?

A It – depending – it's a resistancy, and I don't care to get into the exact operation or [152] the procedure, based on some things around the procedure.

Q I'm not following you.

THE WITNESS: Can I speak with you?

MR. REBEIN: Sure.

MR. DOWELL: I think that would be appropriate.

(Brief recess taken.)

MR. REBEIN: Are we okay?

MR. DOWELL: Yeah. I think that he misunderstood the nature of the question.

Q (By Mr. Rebein) Okay. What does the sensor, skin sensor, what is that measuring?

A It measures a – kind of a resistance of electricity in the body.

Q Does – and does that go into the test results somehow?

A It's printed on the chart that – the printout chart of the assessment.

Q Is that part of your assessment?

A Yes. The participants, the inmates see the exact same thing I see that's printed out across the computer screen.

Q Does it measure the level of blood flowing through the – your hands or what is it [189] there.

Q Do you ever ask an inmate about sexual offenses other than the ones that they've been convicted for?

A I would ask inmates on the frequency of sexual offense, the number of times, "Did any other sexual acts take place other than what you've reported."

Q What about with other – other people – people other than their victims? Do you ask questions about that?

A Other –

Q Let me give you an example. Say someone has been convicted of rape.

A Okay.

Q Do you – you've tested men who have been convicted of rape, haven't you?

A Yes.

Q Have you ever asked someone who's been convicted of rape about whether they have sexually assaulted a person other than the person – other than the victim for whom they were – received a conviction for sexually assaulting?

A Yes, I would ask an individual that.

[190] Q Is that frequent? Is that frequently why you're giving – one of the questions on the polygraph exam?

A Not – number of times or other victims would be a normal question or a frequent question, just to rule out and to determine the level of possibly how honest they're being in treatment and how – how many times they may or may not have done what they've done.

Q Has anyone ever disclosed to you that they had, indeed, committed other sexual offenses?

A Several.

Q And what did you do with the information?

A I did nothing with the information except refer that back to their facilitator or their therapist/counselor, "This is what the man reported."

Q Have you ever asked for the person's name?

A I would ask for any – if the person would come to me and say, "Yes, Mike, there has been other victims," I would want to ask for some sort of identifying information, whether it's a name or a letter or a nickname, just so I can keep the individuals apart.

[191] Q Why don't you ask for a name?

A Well, I may ask, "What was the person's name?" If they say "Sarah," that's fine. That's all I need to know is that it was Sarah.

Q Do you ever ask for the last name?

A No. Do you ever ask for the person's address?

A No.

Q Why not?

A I'm not there to investigate their offenses.

Q Has anyone ever told you the full name of the person who they –

A I can't recall for – other than what they were there for or charged with?

Q Yes.

A Not that I can recall. I will usually – well, I do stop them when they get into certain areas that I don't need that information in order for treatment purposes. If they want to tell me it was Sarah so-and-so, I will stop them and say, "I don't need that information," and they understand the limits of confidentiality, that if they give up so much information, then, you know, [192] I may have to take that – well, I definitely will take it to their facilitator/therapist/counselor and then take that to the treatment team, to see if that's reportable or not.

Q What do you mean by "reportable"?

A If it needed to be reported further in some other area.

Q Such as, what, a child abuse situation?

A Yeah. I'm not – that's not my profession, so I turn it over to the treatment team and let them decide whether it would fall under a certain category.

Q Let me make sure I understand your testimony. Have you ever had an inmate tell you the full name of a

person whom they sexually assaulted which was not the victim for whom they'd been convicted?

A Not that I can recall.

Q Do you ever ask –

A I have had participants give me names that they have told me are not real names of other – of victims that they've offended against.

Q What about child molestation? Do you ever ask an inmate whether they have molested a [193] child? And this is during the polygraph exam.

A Yes.

Q And has anyone ever reported to you that they had?

A Yes.

Q And has anyone ever told you that they had molested someone different than the person that they were convicted of molesting?

A Yes.

Q And did you ask for the victim's name?

A Not – as I explained before, an identifier to that person so that we could keep them separate. If I have Sarah who is 12 and Jill who is 10 and Billy who is 8, I need to have an identifier to identify those people whether they're their real names or not, I do not know. I've had several people disclose that way.

Q Has anyone ever disclosed to you the real name of the – of an additional victim?

A Not that I can recall.

Q Have you ever taken the information about child molestation and reported it to the SRS?

* * *

[199] the polygraph tests are discussed in group therapy, correct?

A Yes.

Q And there's certainly nothing keeping the inmates – requiring the inmates to keep that information confidential, correct?

A No. Well, not correct. They sign a commitment packet that they must keep the information that's heard up there and shared up there confidential. Now, whether that's done or not, I'm not aware. I'm not sure whether it is or not.

Q Why don't you use a videotape?

MR. DOWELL: Object to the form of the –

Q (By Mr. Rebein) Sorry. In the plethysmograph examination.

A I – for what purpose?

Q To use that to see if the inmates get aroused from watching the videotape.

A Oh, okay. Are you saying videotape stiumlus –

Q Yes.

A – or videotape them taking the assessment?

Q Let me – stimulus.

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE, Plaintiff, -vs- DAVID R. McKUNE, et al., Defendants.	)	Case No. 95-3266-DES

THE DEPOSITION OF KATHRYN PHOENIX, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Monday, September 30, 1996, at the Lansing Correctional Facility, in the City of Lansing, in the County of Leavenworth and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[19] needed, and I'll go by what's in the master file. And then I work with the client to have them feel comfortable

enough to let me know about their life and then look at that picture. It's like placing a lot of pieces to a puzzle together.

Q Would one of those components be a sexual history?

A Correct.

Q And you have – everyone's required to fill out a sexual history from the first time they kiss a girl to their first actual sexual intercourse experience to all other forms of –

A Correct.

Q – sexual interaction, deviant and normal, right?

A Correct.

Q And what's the purpose of having them fill out the sexual history?

A It's used for clinical purposes for therapy, to look at their developmental issues. Also, another component to use is their autobiography. It's just not one thing that basically creates a sex offender, it's an

* * *

[35] court documents or something from his conviction?

A Right. Any other prior convictions are in the master file.

Q What about charges but no convictions? Are you aware –

A Charges, right, are in the master file. Any information pertaining to sex offending behavior.

Q Okay. Now, the question that I asked you was: What's your strategy to get them to be candid and forthcoming and talk about these other sexual offenses?

A Okay. Since we work in group, there is a lot of education that takes place. We use Freeman-Longo material, the books – it's written in Freeman-Longo's workbooks that – in reference to this being a buildup and prior offenses. Films also address this issue.

Q Do you use group therapy?

A Right. Correct. Group therapy, having other individuals talk about their sexual history, their autobiography. Again, allowing this person to feel safe that they're about to [36] disclose that they've had this particular behavior over time.

Q Uh-huh. What do you do if you get a sense of – if an inmate is, for lack of a better way to put it, sandbagging or not being completely forthright about some of his past sexual offenses, and you have an idea, from whatever source, that you believe he may have past sexual offenses? Do you say, "Listen, Joe, I think that there's some other past offenses that you need to come forward with or at least be candid about to fully understand your misconduct"?

A What I would generally work at is saying, "Okay. There is – all of this information is provided. What do you think about that? What do you think how – how that applies to your life?" And just going back with whatever the responses are. Then, "Well, I understand from what you're saying in your sexual history in regards to this area, maybe you need to look at that a little bit more

closely. What do you" – and then if there's a particular date or a particular charge or even a prior conviction, would work at,

* * *

[46] think these type – this inmate should these questions under the polygraph"?

A Or "Ask those – these particular questions." Now, it's –

Q To get – is that to help him come to terms with his sexual deviancy, if he's denying it?

A His offense behavior?

Q Uh-huh.

A Correct.

Q What if the polygraph doesn't show that he – he's answered all of his questions correctly, for example? I don't – would you ask an inmate, "Did the victim suffer pain and suffering for the offense for which you were convicted?" Would that be one of the type of questions?

A No.

Q Could you give me an example?

A Of a question that might –

Q Yes.

A "Did you" – I don't say the – Mike Parsons gives the polygraph and I – again, not fully understanding how he goes about that process, because sometimes I've given him a sentence [47] and he says, "Well, I need to reform that sentence."

Q Sure.

A He's the technician. He knows that stuff.

Q Uh-huh.

A But the group might have a question that they want a particular inmate to find an answer to, a real general statement like, "Did you hit your victim and push your victim down prior to your sexually assaulting them?" So that's how the group might – would formulate a question.

Q Okay. If the inmate takes the polygraph and answers the question and it doesn't show that he's not telling the truth, that he – or that he is telling the truth for whatever the question is, what do you do with that?

A Again, that's – we talk about that in group and allow the participant to talk about how – what they think about the process, how they felt about it, how it would apply in their cycle. Just going with where – where they are with their deviant cycle.

Q Would you allow an inmate to take a polygraph if he wanted to ascertain and show to you

* * *

[50] what is your duty or obligation, if any at all, to let someone know that these other children have been molested? That's a hypothetical.

A Mandatory reporting –

Q That's your obligation?

A No. It's a part of – because I'm a licensed social worker, I'd have to have concrete information in order to

report it. I need a date and a time, basically questions of who, what, why, when, and where. I need all of that in order to report.

Q Uh-huh.

A If an individual discusses their offending behavior and they generalize and state, "Well, I have 25 other victims." "Okay. You have 25 other victims. So there's offending behavior. Let's take a look at that."

Within the assessment and evaluation phase and all of the education in regards to offending behavior, the participants are informed that there's mandatory reporting if we have all the who, what, whys, when and wheres.

[1-B]

LUKE REED, Petitioner, -vs- DAVID McKUNE, Respondent.	)	Case No. 9606 HC 00071

PARTIAL TRANSCRIPT

Proceedings of Hearing on Petition for Writ of Habeas Corpus had before the HONORABLE MARTIN ASHER, DISTRICT JUDGE, at Leavenworth, Kansas, on November 4, 1996.

* * *

[27] voluntarily. And the inmate puts on there that he's doing it because he doesn't want to lose his housing or he's doing it under duress. Are you familiar with that situation?

A. Okay.

Q. What does the department do to that inmate?

A. It's consider [sic] the same as a refusal.

Q. Even it it's a true statement?

A. I can't judge whether it being a true statement or not.

Q. Is there not a disciplinary regulation that is punishable by the very disciplinary penalties? Segregation.

Restriction. Loss of good time, et cetera, for an inmate laying to any staff or contract employee?

A. There's a rule infraction for lying; yes. And it is punishable by some of the things you said there; yes.

Q. So an inmate is under a duty not to lie to anybody that works for, or the contractee of Department of Corrections. Is that correct?

A. They're supposed to not do that; right.

Q. Okay. So if they get up to S.A.T.P. and S.A.T.P. says are you here voluntarily, and they put no. I'm here because I'm afraid I'll lost my housing and I'll get made unassigned for cause, you penalize him for that. Is that correct?

A. We penalize them because the program cannot take them [28] into the program that they say that they're there because they're being forced there and they have no desire to learn. While they're there.

Q. The second part of that, where there's no desire to learn. What if that's not a factor. It's just that they want on the record the truth. That they are there solely because the Department has it's course of mechanism to force them up there. They still get punished; correct?

A. They receive sanctions; yes.

Q. And those are the same sanctions as if the inmate had never, absolutely refused to even go to the program at all.

A. Yes.

Q. So the Department doesn't consider this a voluntary program but the S.A.T.P. people do. Is that correct?

A. I can't speak for them.

Q. Okay. Does the Department consider this a voluntary program?

A. (No audible response.)

Q. Let me help you. Voluntary in a sense that it's done at his own free will. It's done at the inmate's own free will.

A. The Department believes that if a person is assessed that program through the classification process, that

* * *

Citation Rank (R) Database Mode
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Atty. Gen.
XXVIII Kan. Op. Atty. Gen. 25, Kan. Atty. Gen. Op. No. 94-67, 1994 WL 240550 (Kan.A.G.)

Office of the Attorney General
State of Kansas

Opinion No. **94-67**
May 17, 1994

Re: Minors – Kansas Code for Care of Children; Matters Prior to Filing Petition – Reporting of Certain Abuse or Neglect of Children; Persons Reporting

Public Health – Confidential Communications and Information; Treatment Facility Patients – Privilege of Patient of Treatment Facility to Prevent Disclosure of Treatment and of Confidential Communications; Exceptions to Privilege

Synopsis: Licensed psychologists (who direct registered masters level psychologist) and licensed social workers employed at a treatment facility are required to report incidents of suspected child abuse or neglect which are disclosed during an examination or interview. This requirement is applicable to communications made by a criminal defendant during the course of a court-ordered mental evaluation as well as to other communications made by a patient of a treatment facility. Because of a specific statutory exception, the reporting of such incidents is not considered a breech of the patient's privilege to prevent disclosure of confidential communications. Cited herein: K.S.A. 21-2606; K.S.A.1993 Supp. 21-3504; 21-3505; 38-1522; 65-5601; 65-5602.

Honorable Tim Shallenburger
State Representative, 1st District
2027 Fairview
Baxter Springs, Kansas 66713

Dear Representative Shallenburger:

As representative for the first district, you request our opinion regarding the interplay of K.S.A. 38-1522, the "duty to report child abuse and neglect" statute, and the privilege of nondisclosure of confidential communications within a particular factual situation.

You present the following scenario: After entering pleas of guilty to one count of criminal sodomy (K.S.A.1993 Supp. 21-3505) and two counts of aggravated indecent liberties with a child (K.S.A.1993 Supp. 21-3504), the court ordered a presentence report. As a part of the presentence report the court ordered a mental examination of the defendant pursuant to K.S.A. 21-2606(a). The mental examination was conducted at a community mental health center by a registered masters level psychologist practicing under the direction of a licensed psychologist. During the course of the evaluation the defendant disclosed in excess of forty additional victims who were not the subjects of the original charges.

In light of this situation, you pose the following questions:

> "1. When admission to illegal sexual acts are disclosed during the course of an evaluation for suitability for outpatient sexual offender treatment or during a court ordered presentence evaluation, is the examiner obligated by law to report those incidents to the proper authority?

"2. If not legally obligated to report such incidents, would it be considered a breech of confidentiality if a report is made? Is there a difference if a court orders an evaluation? Is there a difference whether a social worker or masters level psychologist performs the evaluation?"

The court-ordered mental examination in issue was conducted at a community mental health center which is a treatment facility pursuant to the confidential communications and information act, K.S.A. 65-5601 et seq. A person who is examined or interviewed at a treatment facility has a privilege to prevent treatment personnel from disclosing any confidential communications made for the purposes of diagnosis or treatment of the patient's mental, alcoholic, drug dependency or emotional condition. K.S.A. 65-5602. Any employee of a treatment facility is considered to be treatment personnel. K.S.A. 65-5601(b) and (c). However, this privilege of nondisclusure [sic] of confidential communications is not absolute. K.S.A. 65-5603(a) lists thirteen exceptions to this privilege, one of which is pertinent to this opinion. Specifically, the privilege to prevent disclosure does not extend to:

"any communication which forms the substance of information which the treatment personnel or the patient is required by law to report to a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed;" K.S.A. 65-5203(a) (4).

This exception clearly permits disclosure of otherwise confidential communications if such is information which treatment personnel are required to report. K.S.A.

38-1522 requires specified persons to promptly report any suspicision "that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse." (Depending upon the circumstances the report is required to be made to the state department of social and rehabilitation services, the appropriate law enforcement agency or the attorney general.) While licensed psychologists and licensed social workers are among the persons specified by K.S.A. 38-1522 as falling within this mandatory reporting obligation, registered masters level psychologists are not listed. However, in the situation presented the registered masters level psychologist worked under the direction of a licensed psychologist who is required to report suspected abuse and neglect of children.

In conclusion, a licensed psychologist (who directs the practice of a registered masters level psychologist) or a licensed social worker employed at a treatment facility is required to report incidents of child abuse or neglect which are disclosed during an examination or interview. This requirement is applicable to communications made by a criminal defendant during the course of a court-ordered mental examination conducted at a treatment facility as well as to other communications made by a patient of a treatment facility. Because of a specific statutory exception, the reporting of such incidents is not considered a breech of the patient's privilege of confidentiality.

Please be advised that the foregoing conclusion is premised on the specific facts presented. While a different set of facts might result in a similar conclusion, we

have analyzed only the statutes applicable to the situation presented.

Very truly yours,

Robert T. Stephan
Attorney General of Kansas

Camille Nohe
Assistant Attorney General
1994 WL 240550 (Kan.A.G.),
XXVIII Kan. Op. Atty. Gen. 25,
Kan. Atty. Gen. Op. No. 94-67,
1994 WL 240550 (Kan.A.G.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT G. LILE, Plaintiff,	)	
v.	)	CASE NO.
DAVID R. McKUNE, et al.,	)	95-3266-DES
Defendants.	)	

ORDER

(Filed Apr. 23, 1996)

This matter is before the court on plaintiff's motion for a temporary injunction (Doc. 77). Plaintiff, an inmate confined in Lansing Correctional Facility in Lansing, Kansas, proceeds with appointed counsel on a civil rights complaint filed pursuant to 42 U.S.C. § 1983, in which he alleges constitutional error in his required participation in the Sexual Abuse Treatment Program (SATP) at the facility. Having considered the record and the testimony presented at the hearing on plaintiff's motion, the court enters the following findings and order.

Plaintiff is serving a life sentence for 1983 convictions for the aggravated kidnapping, rape, and aggravated sodomy of a high school student. In a separate action,[1] plaintiff seeks a federal writ of habeas corpus based upon alleged constitutional error in those convictions.

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[1] *Lile v. State of Kansas*, No. 95-3032-DES.

In January 1990, plaintiff entered into a recommended Inmate Program Agreement that did not include SATP programming. After completing his program agreement in July 1994, plaintiff's Unit Team Counselor recommended the agreement be amended to include SATP programming. Plaintiff refused to accept this amendment.

In January 1995, defendant Secretary of Corrections Simmons issued a Policy Memorandum declaring null and void all program agreements of inmates with controlling offenses prior to July 1, 1988. New program plans were to be offered that included notice that "refusal to participate in or successfully complete recommended programs shall result in the withholding of good time credits."[2] Believing the decision whether to accept the new program agreement was no longer "voluntary," plaintiff accepted an agreement which included SATP programming. Further, by interdepartmental memorandum in March 1995, defendant Simmons indicated that inmates refusing to participate in recommended programs would be ineligible for medium security housing, and would be transferred to the maximum security cellhouse.[3]

The SATP programming requires, in part, that an inmate admit guilt in the sexual offense(s) of which he was convicted, and that an inmate participate in polygraph and plethysmography testing. Defendants acknowledge that under the current Offender Privileges

[2] Exhibit G in the Martinez report submitted with defendants' answer (Doc. 74) to the original complaint.

[3] Exhibit H in the Martinez report submitted with defendants' answer (Doc. 74) to the original complaint.

and Incentives policy,[4] if plaintiff refuses the recommended SATP programming, he shall lose all rights and privileges attendant to his current medium security (Level III) custody, and he will be immediately dropped to maximum security (Level I) with significant restrictions on his privileges.

In his complaint, plaintiff seeks a declaratory judgment that the required SATP programming violates his rights under the First and Fifth Amendments, as well as his constitutional right to privacy and to due process. Plaintiff also seeks injunctive relief to prevent defendants from coercing or forcing him to participate in the SATP programming. Plaintiff's motion for temporary injunctive relief focuses on preventing defendants from transferring plaintiff to maximum security with loss of privileges, based upon plaintiff's assertion of his constitutional rights.

Defendants indicated in the hearing on plaintiff's motion that plaintiff is currently still on the waiting list for SATP.

A final pretrial hearing is set in this case in less than four months, and dispositive motions are to be filed on or before September 6, 1996.

[4] Internal Management Policy and Procedure (IMPP)11-101, effective January 1, 1996. Exhibit N in the Martinez report submitted with defendants' answer (Doc. 74) to the original complaint.

Standards

To obtain injunctive relief, the moving party must establish:

> (1) the movant will suffer irreparable injury unless the injunction issues;
>
> (2) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party;
>
> (3) the injunction, if issued, would not be adverse to the public interest; and
>
> (4) substantial likelihood that the movant will succeed on the merits.

Walmer v. United States Department of Defense, 52 F.3d 851, 854 (10th Cir.), *cert. denied*, 116 S.Ct. 474 (1995). If the first three standards are met, the likelihood of success requirement is satisfied if the moving party shows there are serious, substantial, and difficult questions regarding the merits of the moving party's claim that make the issue ripe for litigation and deserving of more deliberate investigation. *Id.*

Also, "when due process contentions are raised relative to the operation, maintenance and administration of the penal system, the courts should be acutely aware that caution must be exercised in achieving a careful balance of the interest of that system as against the interests of the prisoners." *Marchesani v. McCune*, 531 F.2d 459, 461 (10th Cir.) (citations omitted), *cert. denied*, 429 U.S. 846 (1976).

Discussion

Having reviewed the record and the testimony in the hearing on plaintiff's motion, the court is persuaded that the standards for obtaining preliminary injunctive relief are satisfied in this case.

First, constitutional rights are at issue. Plaintiff claims significant violations of his constitutional rights will result if he is required to participate in the SATP programming as it is conducted at the Lansing facility, or if he is forced to suffer harsh and punitive measures for asserting his constitutional rights. The punitive measures for refusing recommended programming pose an imminent and distinct threat to plaintiff. Plaintiff seeks protection from this court only to preserve the status quo of remaining on the waiting list for SATP programming until the merits of his constitutional claims have been decided. Defendants' pleadings and testimony make clear that absent such protection, plaintiff's assertion of his constitutional rights will result in irreparable injury that cannot be undone through monetary relief. Defendants cite their broad deference in prison management, as well as the due process limitations recognized in *Sandin v. Conner*, 115 S.Ct. 2293 (1995), regarding segregated confinement, and claim, thereby, that plaintiff's transfer to Level I does not constitute irreparable injury. This claim sidesteps the obvious reason for the transfer in the first place, that the transfer directly results from plaintiff's assertion of his constitutional rights.

Second, the threatened injury to plaintiff's constitutional rights outweighs defendants' interest in requiring plaintiff to participate in SATP prior to the resolution of

plaintiff's constitutional challenge to this programming. Plaintiff is currently on a waiting list for SATP programming, and until forced to participate in such programming, he is not subject to the complained of "punishment" attendant to the offender management policy for refusing such programming. No dismantling of either SATP or the Offender Privileges and Incentive policy is required to continue the status quo and allow plaintiff to remain on the waiting list for this particular programming. Plaintiff indicates he is willing to participate in the program if the operation and methodology of the program passes constitutional muster. Defendants cite no harm in delaying plaintiff's programming other than a broad and speculative claim that it will invite a floodgate of inmate litigation.

Third, the public interest is served by an offender program that passes constitutional muster. Although defendants argue it would not be in the public interest to dismantle the Offender Incentives and Privileges policy, the court finds this argument overstates the effect of the requested preliminary injunctive relief. The relief sought flows to a single inmate who is currently on a waiting list for the complained of programming, who proceeds with appointed counsel on significant issues, and whose litigation is proceeding in an orderly and timely manner towards resolution. *See Sisneros v. Nix*, 884 F.Supp. 1313, 1348 (S.D.Iowa 1995) (rectifying wrongful transfer is not untoward interference in prison operation; defendants required only to honor constitutional obligations); *St. Claire v. Cuyler*, 482 F.Supp. 257, 260 (E.D.Pa. 1979) (public interest requires constitutional administration of prison).

Fourth, the court finds plaintiff's challenges to the constitutionality of the SATP programming at LCF raise issues that are sufficiently serious and substantial as to make them fair grounds for litigation. For example, plaintiff's Fifth Amendment claim has some support in federal and state courts. *See United States v. Ross*, 9 F.3d 1182, 1195-97 (7th Cir. 1993) (concurring opinion), *cert. granted and judgment vacated on other grounds*, 114 S.Ct. 2129 (1994). *See also Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991) (where inmate convicted by jury while denying guilt, trial court erred in requiring defendant to support therapy with admission of guilt to avoid revocation of probation).

In sum, the court concludes a preliminary injunction would preserve the status quo, avoid potential irreparable injury to plaintiff's constitutional rights, and not be adverse to public interests. The court further finds plaintiff's constitutional claims raise questions sufficiently serious, substantial and difficult as to make them ripe for litigation.

IT IS THEREFORE ORDERED that plaintiff's motion for a temporary injunction (Doc. 77) is granted. Plaintiff is to continue on the waiting list for SATP programming at Lansing Correctional Facility, and defendants are enjoined from coercing in any manner plaintiff's acceptance of or participation in SATP programming, until the merits of plaintiff's claims have been decided.

DATED: This 23 day of April, 1996 at Topeka, Kansas.

/s/ DALE E. SAFFELS
DALE E. SAFFELS
United States District Judge

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